SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 395

RICHARD PERRY LOVING, ET UX., APPELLANTS,

vs.

VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

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[fol. A]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

RICHARD PERRY LOVING, et al.,

v.

COMMONWEALTH OF VIRGINIA.

FROM THE CIRCUIT COURT OF CAROLINE COUNTY

[fol. 1]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

RICHARD PERRY LOVING and MILDRED JETER LOVING,
Plaintiffs in Error,

against

COMMONWEALTH OF VIRGINIA, Defendant in Error.

From the Circuit Court of Caroline County
Leon M. Bazile, Judge

WRIT OF ERROR AND SUPERSEDEAS AWARDED—June 11, 1965

Upon the petition of Richard Perry Loving and Mildred Jeter Loving a writ of error and *supersedeas* is awarded them to a judgment rendered by the Circuit Court of Caroline County on the 22nd day of January, 1965, in a prosecution by the Commonwealth against the said petitioners for a felony; but said *supersedeas*, however, is not to operate to discharge the petitioners from custody, if in custody, or to release their bond if out on bail.

[fol. 2] Record

COMMONWEALTH WARRANT—July 11, 1958

To the Sheriff or any Police Officer of the said County:

Whereas, Bernard Mahon, Com. Atty., of the said County, has this day made complaint and information on oath before me, Robert W. Farmer, Justice of the Peace of the said County that Richard Loving (a white person) and in the said County did on the 2nd day of June, 1958, unlawfully and feloniously did go out of this State for the purpose of being married to Mildred Jeter a Negro and with the intention of returning and was married out of State to the said Mildred Jeter, and afterward, returned to and resided in it, cohabiting as man & wife against the peace and dignity of the Commonwealth of Virginia.

These are, Therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the Judge of the said County the body of the said Richard Loving to answer the said complaint, and to be further dealt with according to law. And you are directed to summon ..... as witnesses.

Given under my hand and seal this 11th day of July, 1958.

Robert W. Farmer, J. P.

State of Virginia,
County of Caroline, to-wit:

I, J. L. Webb, Justice of the Peace in and for the County aforesaid, State of Virginia, do certify that Richard Loving and Eleanor A. & John Koons, by, Robert E. Buchanan, attorney in fact as his suret ....., have this day acknowledged themselves indebted to the Commonwealth of Virginia in the sum of one thousand & no/100 Dollars ($1,000.00, to be made and levied of their respective goods and chattels, upon this condition: That the said Richard Loving shall appear before the County Court of the said County, on the 17th day of July 1958, at 10 A. M., at Bowling Green, Va., and not

leave hence without the leave of the said Court, and that he appears before the Court to answer the charge in this warrant, and/or any continuance thereof, and/or abide the judgment of said Court, and/or any appeal therefrom, or to [fol. 3] await the action of the Grand Jury upon the within charges, at such time or times as may be prescribed by the Court and at any time or times to which the proceedings may be continued or further heard, and to remain in full force and effect until the charge is finally disposed of or until it is declared void by order of a competent Court.

Given under my hand, this 14th day of July, 1958.

J. L. Webb, J. P.

(on back)

COMMONWEALTH,

v.

RICHARD LOVING.

Warrant of Arrest

Executed this, the 13th day of July, 1958.

Garnett Brooks, Sheriff.

Upon the defendant's plea of not guilty to the within charge, and upon examination of the witnesses, I find probable cause to charge the accused with a felony and it is ordered that he be held for the action of the grand jury. 7-17-58.

Edward Stehl, III, Judge.

COMMONWEALTH WARRANT—July 11, 1958

To the Sheriff or any Police Officer of the said County:

Whereas Bernard Mahon, Com. Atty., of the said County, has this day made complaint and information on oath

before me, Robert W. Farmer, Justice of the Peace of the said County that Mildred Jeter a Negro in the said County did on the 2nd day of June, 1958, unlawfully and feloniously [fol. 4] did go out of this State for the purpose of being married to Richard Loving, a white person, and with the intention of returning, and was married to the said Richard Loving out of State, and afterwards, returned to and resided in it, cohabiting as man & wife against the peace and dignity of the Commonwealth of Virginia.

These are, Therefore, to command you, in the name of the Commonwealth, to apprehend and bring before the Judge of the said County the body of the said Mildred Jeter to answer the said complaint, and to be further dealt with according to law. And you are directed to summon ..... as witnesses.

Given under my hand and seal this 11th day of July, 1958.

Robert W. Farmer, J. P.

State of Virginia,
County of Caroline, to-wit:

I, Edward Stehl III, Justice of the Peace in and for the County aforesaid, State of Virginia, do certify that Mildred Jeter and Ronnie W. Catlett, as his surety, have this day acknowledged themselves indebted to the Commonwealth of Virginia in the sum of one thousand Dollars ($1,000.00), to be made and levied of their respective goods and chattels, upon this condition: That the said Mildred Jeter shall appear before the Circuit Court of the said County, on the 13th day of October 1958, at 10:00 A. M., at Bowling Green, Va., and not leave hence without the leave of the said Court, and that he appears before the Court to answer the charge in this warrant, and/or any continuance thereof, and/or abide the judgment of said Court, and/or any appeal therefrom, or to await the action of the Grand Jury upon the within charge, at such time or times as may be prescribed by the Court and at any time or times to which the proceedings may be continued or further heard, and to remain in

full force and effect until the charge is finally disposed of or until it is declared void by order of a competent Court.

Given under my hand, this 24th day of July, 1958.

Edward Stehl III, Judge.

Ronnie W. Catlett

(on back)

[fol. 5]

COMMONWEALTH,

v.

MILDRED JETER.

Warrant of Arrest

Executed this, the 17 day of July, 1958.

Garnett Brooks, Sheriff.

Upon the defendant's plea of not guilty to the within charge, and upon examination of the witnesses, I find probable cause to charge the accused with a felony and it is ordered that she be held for the action of the grand jury 7-17-58.

Edward Stehl III, Judge.

IN THE CIRCUIT COURT OF CAROLINE COUNTY

INDICTMENT

The grand jurors of the Commonwealth of Virginia, in and for the body of the County of Caroline, and now attending the said court at its October, 1958 term upon their oath present that Richard Perry Loving and Mildred Delores Jeter on the 2nd day of June, 1958, in the said County of

Caroline, the said Richard Perry Loving being a White person and the said Mildred Delores Jeter being a Colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife, against the peace and dignity of the Commonwealth.

(on back)

A True Bill.

Mrs. Gladys Livermon, Foreman.

[fol. 6]

IN THE CIRCUIT COURT OF CAROLINE COUNTY

JUDGMENT—January 6, 1959

This day came the attorney for the Commonwealth and the accused, who were represented by counsel, appeared in court upon their own recognizance. Upon being arraigned the accused both plead "not guilty" to the charges in the indictment and waived trial by jury and the Commonwealth by its attorney doth agree to the waiving of trial by jury and the court doth consent thereto. Whereupon the court proceeded to hear the evidence and argument of counsel. After the court heard the evidence and argument of counsel, the accused doth change their plea from "not guilty" to "guilty". The court doth accept the pleas of "guilty" and fix the punishment of both accused at one year each in jail. The court doth suspend said sentence for a period of twenty-five years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years. Whereupon the court asked the accused if they had anything to say before the

court pronounced sentence and when they answered "no" the court proceeded to sentence the prisoners. After the prisoners were sentenced they paid the costs of these proceedings into court and the court ordered them released from custody and further recognizance.

Leon M. Bazile, Judge.

6 January 1959.

Filed 6 Nov. '63.

L. M. B.

IN THE CIRCUIT COURT OF CAROLINE COUNTY

MOTION TO VACATE JUDGMENT AND SET ASIDE SENTENCE

Comes Now the defendants, through counsel, and moves this honorable court to vacate the judgment against them and set aside the suspended sentence, declaring:

[fol. 7] 1. That on January 6, 1959, judgment was rendered and entered by this court in the above-entitled action, by which it was adjudged that the punishment of both defendants be fixed at one year in jail, such sentence to be suspended for a period of twenty-five (25) years upon the condition that both leave Caroline County, Virginia, at once and do not return together or at the same time to said county and state for a period of twenty-five (25) years. A copy of the record entry of said judgment is attached hereto and marked Exhibit "A".

2. That the defendants have complied with and abided by said judgment, and have thereby been banished from the state and county aforesaid.

3. That said judgment be vacated and said suspended sentence be set aside on the grounds that:

A. Said sentence constitutes cruel and unusual punishment, within the meaning of Section 9 of the Virginia Constitution.

B. Said sentence exceeds the reasonable period of suspension permitted by Sec. 53-272 of the Code of Va., 1950, as amended.

C. Said sentence constitutes banishment, and is thus a violation of constitutional due process of law.

D. Said sentence is improper because it is based on a statute which is unconstitutional on its face, in that it denies the defendants the equal protection of the laws and denies the right of marriage which is a fundamental right of free men, in violation of Section 1 of the Virginia Constitution, and the 14th Amendment of the Federal Constitution.

E. Said statute and said sentence are unconstitutional burdens upon interstate commerce.

F. Such sentence has worked undue hardship upon the defendants by preventing them from together visiting their families from time to time as may be desireable and necessary, to promote domestic tranquility.

Wherefore, defendants pray that said judgment be vacated and sentence set aside.

Richard Perry Loving, Mildred D. Jeter Loving,
By Bernard S. Cohen, Counsel.

[fol. 8]

IN THE CIRCUIT COURT OF CAROLINE COUNTY

OPINION

The Petitioners here was indicted in this Court at the October term, 1958, the indictment charging that on the 2nd day of June, 1958, "that Richard Perry Loving being a white man and the said Mildred Delbres Jeter being a colored person did unlawfully go out of the State of Vir-

ginia for the purpose of being married and with the intention of returning to the State of Virginia, and were married out of the State of Virginia, to-wit in the District of Columbia on the 28th day of June, 1958 and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth."

On the 6th day of January, 1959, the accused were arraigned and after pleading not guilty withdrew said plea and pleaded guilty; thereupon the Court fixed their punishment at one year in jail; and then suspended said sentence for twenty-five years "upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years." After they paid the costs they were released from custody and further recognizance.

The Court file contains his birth certificate which shows that he is white and her birth certificate which shows that she is colored.

On the 6th day of November, 1963, they filed a motion to vacate the judgment and set aside the sentence.

1st It is contended the said sentence constitutes a cruel and unusual punishment within Section 9 of the Constitution of Virginia.

Section 9 of George Mason's Bill of Rights made a part of the Constitution of 1776 is in the identical same words as Section 9 of the Bill of Rights to the present Constitution (9 Henrys Statutes 111; Code of 1950, page 443).

In *Hart* v. *Commonwealth,* 131 Va., 726, 741, 109 S. E. 582, the Court said: "It has been uniformly held by this Court that the provisions in question which have remained the same as they were originally adopted in the Virginia Bill of Rights of 1776, must be construed to impose no limitation upon the right to determine and prescribe by statute the quantum of punishment deemed adequate by the legislature. That the only limitation so imposed is upon the mode of punishments, such punishments only being

prohibited by such constitutional provision as were re-[fol. 9] garded as cruel and unusual when such provision of the Constitution was adopted in 1776, namely, such bodily punishments as involve torture or lingering death, such as are inhumane and barbarous, as for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like. *Aldridge's case,* 2 Va. Cas. 447, 449-450; *Wyatt's Case,* 6 Rand (27 Va.) 694; *Bracey's Case,* 119 Va. 867, 862, 89 S. E. 144.

See also *Buck* v. *Bell,* 143 Va. 310, 319, 130 S. E. 516 (1925).

In *Aldridge's Case* (2 Va. Case 447, 448) (1824) a free person of color was convicted of the larceny of bank notes. He was sentenced to be whipped, sold and transported beyond the bounds of the United States. The Court said "as to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case."

In *Wyatt's Case* (6 Rand 694) (1825), the law provided "that when any person was convicted of any crime or offense now punishable by imprisonment in the penitentiary the Court could sentence such person to be imprisioned not exceeding two years in the jail of the County or Corporation where such conviction shall have taken place, for a period not exceeding six months, nor less than one month and he shall be punished by stripes at the discretion of the Court to be inflicted at one time provided the same do not exceed thirty-nine at any one time."

"The Court said the punishment of offenses by stripes is certainly odious, but cannot be said to be unusual."

The Court said 6 Rand 763 "This Court if of the opinion and doth decide that the motion in arrest of judgment and also the motion for a new trial ought to be overruled and the judgment should be rendered against the defendant of imprisonment and strips according to law.

In *Buck* v. *Bell,* 143 Va. 310, 130 S. E. 516 (1925) a case in which it had been ordered that Buck be sterilized, it was contended that it violated the Federal Constitution and Sections 9, 11 of the Virginia Constitution and the 11th Amendment to the Federal Constitution. The Court held that the Sterilization Act did not violate any section of the Constitution of Virginia or any sections of the Federal Constitution.

In Re Kemmler, 136 U. S. 436, 34 *Fed.* 519 (1889) it was held that punishments are cruel when they involve torture or a lingering death but the punishment of death is not within the meaning of that word in the Constitution.

The Court said that cruel and unusual punishments are "such as burning at the stake, crucifixion, breaking on the wheel or the like." (34 Fed. 524)

And the Supreme Court of the United States has held in [fol. 10] *Onell* v. *Vermont* that whether a punishment is cruel and unusual within the provisions of a State Constitution does not present a Federal question.

In U. S. Supreme Court Enc. of U. S. Supreme Court Volume 4 p. 513, it is said "The provision of the 8th Amendment that excessive fines shall not be imposed nor cruel and unusual punishment inflicted applies to National and not to State legislation.

It is next said that the sentence exceeds a reasonable period of suspension within the meaning of Section 53-273 of the Code of 1950.

The Court has examined this Section with care and it sees nothing in this statute which limits the time that the person may be put on probation.

It is said that the sentence constitutes banishment and thus is a violation of due process of law.

Section 20-58 provides that "If any white person and colored person shall go out of this state for the purpose of being married and with the intention of returning and be married out of it, and afterwards return to and reside in

it, cohabiting as man and wife, they shall be punished as provided in Section 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of this cohabitation here as man and wife shall be evidence of their marriage."

Intermarriage between white and colored persons is prohibited by Section 20-54 of the Code.

Section 20-57 of the Code provides "all marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."

And Section 20-58 of the Code provides "if any white person and colored person shall go out of this State for the purpose of being married and with the intention of returning and be married out of it, and shall afterwards return to reside in it, cohabiting as man and wife, they shall be punished as provided in Section 20-20 and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

These laws were held valid in *Kinney* v. *Commonwealth*, 30 Gratt, 858 (1878) Judge Christian who wrote the opinion said (30 Gratt 870): "If the parties desire to maintain the relations of man and wife, they must change their domicile and go to some State or Country where the laws recognizes the validity of such marriages."

Their marriage being absolutely void in Virginia they [fol. 11] cannot cohabit in Virginia without incurring repeated prosecutions for that cohabitation.

It is next contended that these statutes are unconstitutional in violation of Section 1 of the Virginia Constitution and the 14th Amendment of the U. S. Constitution.

There is nothing in Section 1 of the Constitution of Virginia which relates to this matter, nor is there anything in the 14th Amendment which has anything to do with the subject here under consideration.

Marriage is a subject which belongs to the exclusive control of the States.

In *State* v. *Gibson,* 16 Ind. 180, 10 Am. Rep. 42 a statute prohibiting the intermarriage of negroes and white persons was held not to violate any provisions of the 14th Amendment or Civil Rights Laws in the course of a well-reasoned and well-supported discussion of the powers retained by and inherent in the States under the Constitution said:

"* * * In this State marriage is treated as a civil contract, but it is more than a mere civil contract, it is a public institution established by God himself, is recognized in all Christian and civilized nations and is essential to the peace, happiness, and well being of society. * * * "

"* * * The right in the States to control, to guard, protect and preserve this God-giving, civilizing and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the States suffer or permit any interference therewith. If the Federal Government can determine who may marry in a State, there is no limit to its power * * *." (36 Ind. at p. 402-3)

In *Naim* v. *Naim,* 196 Va. 80, 87 S. E. (2nd) 749 (1953) the Court of Appeals in a well considered opinion held that the Virginia statutes were constitutional and concluded its opinion as follows: "Regulation of the marriage relation is, we think, distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights, which declares 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"

In *Pace* v. *Alabama,* 106 U. S. 583, 1 S. Ct. 637, 27 L. ed. 207, a prosecution for a white person marrying a colored person was upheld. Pace, the negro, contended that the

Statute violated the Equal Protection of the 14th Amendment.

In *Jackson* v. *State,* 37 Ala. App. 519, 72 So. (2d) 114, as the party had been convicted under the miscegenation [fol. 12] statute, the conviction was affirmed against the contentions that the right and privilege of marrying a white person violated the Due Process and Equal Protection clauses of the 14th Amendment the Supreme Court of the United States denied a writ of certiorari (1954).

In *Greenhow & Als.* v. *James' Executor,* 80 Va. 636 (1885) the Court held that the children of a marriage contracted in the District of Columbia between a white person and a colored person could take under a will of a relative.

Such on marriage the Court said (80 Va. 61) " * * * Yet that it can have application to a marriage contract entered into a foreign country in contravention of the public statutes of the country of their domicile which *pronunces* a marriage between them not only absolutely void but criminal. In the very nature of things every *soverign* state must have the power to prescribe what incapacities for contracting marriage shall be established as the law among her own citizens, and it follows therefore that when the state has once pronounced an incapacity on the part of any of its citizens to enter into the marriage relationship with each other that such incapacity attaches itself to the person or parties and although it may not be enforceable during the absence of the parties, it at once revives with all its prohibitive power upon their return to place of domicile. * * * "

In *Toler* v. *Oakwood Smokeless Coal Corporation,* 173 Va. 425, 430 the Court speaking through Mr. Justice Spratley said:

"One state, however, cannot force its own marriage laws, or other laws, on any other state, and no state is bound by comity to give effect in its Courts to the marriage laws of another state, repugnant to its own laws and policy. Otherwise, a state would be deprived of the very essence of its sovereignty, the right of supremacy within its own borders.

Such effect as may be given by a state to a law of another state is merely because of comity, or because justice and policy may demand recognition of such law. Such recognition is not a matter of obligation. Minor on conflict laws Sec. 4, 5, 6 and 126."

In 6 Am. Eng. Enc. of Law 2nd Ed. P. 967 it is said "The right to marry is not such a privilege and immunity but a social institution of great importance subject to state regulation and a statute prohibiting intermarriage between white person and negroes is not a discrimination or unequal law contrary to the terms of the constitutional provisions."

[fol. 13] It is next said that the sentence and the statute are unconstitutional as burdens on interstate commerce.

Marriage has nothing to do with interstate commerce. There is nothing more domestic than marriage; and this contentive is without merit.

It is next said such sentence has involved undue hardships upon the defendants by preventing them from together visiting their families from time to time as may be necessary to promote domestice tranquility.

This complaint relates to the terms of the suspension of this sentence, which is as follows:

"And the Court doth suspend said sentence for twenty-five years upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years."

The Court knew that if they come to Caroline County or to the State of Virginia together that they would be subject to prosecution for unlawful cohabitation and therefore permitted each are to separately visit his or her people, but not together. If it works a hardship on them not to visit their people together it is the law that they cannot cohabit together in Virginia. Each one of them can come to Caroline separately to visit his or her people as often as they please.

Section 53-272 of the Code of Virginia provides in part:

"In any case wherein the Court is authorized to suspend the imposition or execution of sentence, such Court may fix the period of suspension for a reasonable time having due regard to the gravity of the offense, without regard to the gravity period for which the prisoner might have been sentenced."

The parties were guilty of a most serious crime. As said by the Court in *Kinney's Case* 30 Gratt 865: "It was a marriage prohibited and declared absolutely void. It was contrary to the declared public law, founded upon motives of public policy—a public policy affirmed for more than a Century, and one upon which social order, public morality and the best interests of both races depend. This unmistakable policy of the legislature founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriages between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary [fol. 14] enactments, both races might, by stepping across any imaginary line bid defiance to the law by immediately returning and insisting that the marriage celebrated in another state or county should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void."

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

The awfulness of the offense is shown by Section 25-57 which declares: "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.

Then Section 20-59 of the Code makes the contracting of a marriage between a white person and any colored person a felony.

Conviction of a felony is a serious matter. You lose your political rights; and only the government has the power to restore them (Constitution Sec. 73). And as long as you live you will be known as a felon.

"The moving finger writes and moves on
and having writ

Nor all your piety nor all your wit
Can change one line of it."

Leon M. Bazile, Judge.

IN THE CIRCUIT COURT OF CAROLINE COUNTY

ORDER DENYING MOTION TO VACATE JUDGMENT—
January 22, 1965

This day came the defendants, by counsel, and moved the Court to vacate the judgment and set aside the sentence heretofore entered in this cause.

Upon consideration thereof, for reasons stated in an opinion heretofore filed, it is Adjudged and Ordered that the said motion is hereby denied.

It is further ordered that the Clerk of this Court send an attested copy of this order to Bernard S. Cohen, Lainof, Cohen & Cohen, Attorneys at Law, 1513 King Street, Alexandria, Virginia, and J. Peyton Farmer, Commonwealth's Attorney of Caroline County.

Enter 22 January 1965.

Leon M. Bazile, Judge.

[fol. 15]

IN THE CIRCUIT COURT OF CAROLINE COUNTY

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

To the Clerk of the Circuit Court of Caroline County:

Please take notice that the defendants herein, Richard Perry Loving and Mildred Delores Jeter, intend to appeal for a Writ of Error and *Supersedeas* from a final order entered herein on January 22, 1965, which order denied the defendants' motion to vacate the judgment and set aside the sentence previously entered herein. The defendants assign the following errors:

1. The Court erred in holding that the anti-miscegenation statutes did not violate the due process and equal protection clauses of Section 1 of the Constitution of Virginia and the fourteenth amendment to the Federal Constitution.

2. The Court erred in holding that the sentence and suspension was not a violation of due process of law.

3. The Court erred in holding that Section 53-272 of the Code of Virginia of 1950, does not proscribe reasonable limits upon the period of suspension of sentence.

Richard Perry Loving and Mildred Delores Jeter Loving, by Counsel.

Lainof, Cohen & Cohen, Counsel for Defendants, 1513 King Street, Alexandria, Virginia, By B. S. Cohen, By Philip J. Hirschkop.

[fol. 19]

IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 6163

Present: All the Justices

RICHARD PERRY LOVING, et al.,

—v—

COMMONWEALTH OF VIRGINIA.

OPINION BY JUSTICE HARRY L. CARRICO—March 7, 1966
From the Circuit Court of Caroline County
Leon M. Bazile, Judge

On January 6, 1959, Richard Perry Loving and Mildred Jeter Loving, the defendants, were convicted, upon their pleas of guilty, under an indictment charging that "the said Richard Perry Loving being a White person and the said Mildred Delores Jeter being a Colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife." (Code, § 20-58.)[1]

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[1] "§ 20-58. *Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

[fol. 20] The trial court fixed "the punishment of both accused at one year each in jail." (Code, § 20-59.)[2] The court suspended the sentences "for a period of twenty-five years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years."

On November 6, 1963, the defendants filed a "Motion to Vacate Judgment and Set Aside Sentence" alleging that they had complied with the terms of their suspended sentences but asserting that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid.

The court denied the motion by an order entered on January 22, 1965, and to that order the defendants were granted this writ of error.

There is no dispute that Richard Perry Loving is a white person and that Mildred Jeter Loving is a colored person within the meaning of Code, § 20-58. Nor is there any dispute that the actions of the defendants, as set forth in the [fol. 21] indictment, violated the provisions of Code, § 20-58.

The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law.

The problem here presented is not new to this court nor to other courts, both state and federal, throughout the country. The question was most recently before this court in 1955, in *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749, remanded

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[2] "§ 20-59. *Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

350 U. S. 891, 100 L. ed. 784, 76 S. Ct. 151, affd. 197 Va. 734, 90 S. E. 2d 849, app. dism. 350 U. S. 985, 100 L. ed. 852, 76 S. Ct. 472.

In the *Naim* case, the Virginia statutes relating to miscegenetic marriages were fully investigated and their constitutionality was upheld. There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The lone exception, it was noted, [fol. 22] was the California Supreme Court which declared the California miscegenation statutes unconstitutional in *Perez* v. *Sharp,* 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. *Perez* v. *Lippold*).

The *Naim* opinion, written for the court by Mr. Justice Buchanan, contains an exhaustive survey and citation of authorities, both case and text from both state and federal sources, upon the subject of miscegenation statutes. It is not necessary to repeat all those citations in this opinion because the defendants concede that the *Naim* case, if given effect here, is controlling of the question before us. They urge us, however, to reverse our decision in that case, contending that the decision is wrong because the judicial authority upon which it was based no longer has any validity. Our inquiry must be, therefore, whether a change in the *Naim* decision is required.

The defendants say that the *Naim* opinion relied upon *Plessy* v. *Ferguson,* 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138, but argue that the United States Supreme Court reversed the *Plessy* decision in *Brown* v. *Board of Education,* 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686.

The *Plessy* case, decided in 1896, involved an attack upon the constitutionality of a Louisiana statute requiring [fol. 23] separate railway carriages for the white and colored races. The statute was upheld by the Supreme Court under the "separate but equal" doctrine there enunciated by the court.

In the *Brown* case, decided in 1954, the Supreme Court ruled "that in the field of public education the doctrine of 'separate but equal' has no place" and that "Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected." 98 L. ed., at p. 881.

The *Plessy* case was cited in the *Naim* opinion to show that the United States Supreme Court had made no decision at variance with an earlier holding by the Tenth Circuit Court of Appeals in *Stevens* v. *United States,* 146 F. 2d 120, that "a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."

The *Naim* opinion contained a quotation from the *Plessy* case that "Laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state." Nothing was said in the *Brown* case which detracted in any way from the effect of the language quoted from the *Plessy* opinion. As Mr. Justice Buchanan pointed out in the *Naim* opinion, the holding in [fol. 24] the *Brown* case, that the opportunity to acquire an education "is a right which must be made available to all on equal terms," cannot support a claim for the intermarriage of the races or that such intermarriage is a "right which must be made available to all on equal terms."

The United States Supreme Court itself has indicated that the *Brown* decision does not have the effect upon miscegenation statutes which the defendants claim for it. The *Brown* decision was announced on May 17, 1954. On November 22, 1954, just six months later, the United States Supreme Court denied certiorari in a case in which Alabama's statute forbidding intermarriage between white and colored persons had been upheld against the claim that the statute denied the Negro appellant "her constitutional right and privilege of intermarrying with a white male person," and that it violated the Privileges and Immunities, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. *Jackson* v. *State,* 37 Ala. App.

519, 72 So. 2d 114, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U. S. 888, 99 L. ed. 698, 75 S. Ct. 210.

The defendants also say that the *Naim* opinion relied upon *Pace* v. *Alabama*, 106 U. S. 583, 27 L. ed. 207, 1 S. Ct. 637, but contend that the United States Supreme Court overruled the *Pace* decision in *McLaughlin* v. *Florida*, 379 [fol. 25] U. S. 184, 13 L. ed. 2d 222, 85 S. Ct. 283.

The *Pace* case, decided in 1883, involved an attack upon the constitutionality of an Alabama statute imposing a penalty for adultery or fornication between a white person and a Negro. Another statute provided a lesser penalty "If any man and woman live together in adultery or fornication." A white woman and Pace, a Negro, were convicted and sentenced under the first statute "for living together in a state of adultery or fornication." Pace appealed, claiming that the statute under which he had been convicted was violative of the Fourteenth Amendment. The court rejected this claim, holding that "Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race." 27 L. ed., at p. 208.

In the *McLaughlin* case, decided in 1964, the Supreme Court had under review a Florida statute which made it unlawful for a white person and a Negro, "not married to each other," to "habitually live in and occupy in the night time the same room." The statute in dispute provided for a different burden of proof and a different penalty than were provided by other statutes relating to adultery and fornication generally. Florida sought to sustain the [fol. 26] validity of the statute under the holding in *Pace* v. *Alabama*. The court, however, ruled the Florida statute invalid, saying of *Pace* v. *Alabama* that it "represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." 13 L. ed. 2d, at p. 226.

The *Pace* case, like the *Plessy* case, was cited in the *Naim* opinion to show that the United States Supreme Court had

made no decision at variance with the rule that a state may validly forbid interracial marriages. The *McLaughlin* decision detracted not one bit from the position asserted in the *Naim* opinion.

Both parties to the *McLaughlin* controversy cited Florida's miscegenation statute, making it unlawful for a white person to marry a Negro. McLaughlin contended that the miscegenation statute was unconstitutional because it prevented him from asserting, against the cohabitation charge, the defense of common law marriage. Florida argued that it was necessary that its cohabitation statute be upheld so as to carry out the purposes of its miscegenation statute which, it contended, was "immune from attack under the Equal Protection Clause." The court ruled that it was [fol. 27] unnecessary to consider McLaughlin's contention in this respect because the court was holding in his favor on the cohabitation statute. As for Florida's contention, the court said that, for purposes of argument, the constitutionality of the miscegenation statute would be assumed and that it was deciding the case "without reaching the question of the validity of the State's prohibition against interracial marriage." 13 L. ed. 2d, at p. 230.

The defendants direct our attention to numerous federal decisions in the civil rights field in support of their claims that the *Naim* case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law.

We have given consideration to these decisions, but it must be pointed out that none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized—that there is an overriding state interest in the institution of marriage. None of these decisions takes away from what was said by the United States Supreme Court in *Maynard* v. *Hill*, 125 U. S. 190, 31 L. ed. 654, 657, 8 S. Ct. 723:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and [fol. 28] civilization of a people than any other insti-

tution, has always been subject to the control of the Legislature."

The defendants also refer us to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the *Naim* decision is erroneous and that such marriages should not be forbidden by law.

A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term. Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate.

Our one and only function in this instance is to determine whether, for sound judicial considerations, the *Naim* case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case. [fol. 29] According that decision all of the weight to which it is entitled under the doctrine of *stare decisis,* we hold it to be binding upon us here and rule that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States.

We turn now to the other contention of the defendants —that the sentences imposed upon them are unreasonable and void.

It will be recalled that the trial court suspended the sentences of the defendants for a period of twenty-five years upon the condition that they leave the county and state "at once and do not return together or at the same time to said county and state for a period of twenty-five years."

The defendants first say that the effect of the sentences was to banish them from the state. They refer us to the case of *State* v. *Doughtie,* 237 N.C. 368, 74 S. E. 2d 922, where it was held that "banishment . . . is impliedly prohibited by public policy . . . A sentence of banishment is undoubtedly void."

Although the defendants were, by the terms of the suspended sentences, ordered to leave the state, their sentences did not technically constitute banishment because they [fol. 30] were permitted to return to the state, provided they did not return together or at the same time.

Thus, we do not agree with the defendants' contention that the sentences are void because they constitute banishment. We do agree with their further contention, however, that the conditions of the suspensions are so unreasonable as to render the sentences void.

The trial court acted under the authority of Code, § 53-272 in suspending the sentences of the defendants. The purpose of this statute is to secure the rehabilitation of the offender, enabling him to repent and reform so that he may be restored to a useful place in society. *Marshall* v. *Commonwealth,* 202 Va. 217, 219, 116 S. E. 2d 270; *Slayton* v. *Commonwealth,* 185 Va. 357, 365-366, 38 S. E. 2d 479; *Wilborn* v. *Saunders,* 170 Va. 153, 160-161, 195 S. E. 723.

To effect this statutory purpose, the courts are authorized to impose conditions upon the suspension of execution or imposition of sentence. But such conditions must be reasonable, having due regard to the nature of the offense, the background of the offender and the surrounding circumstances. *Dyke* v. *Commonwealth,* 193 Va. 478, 484, 69 S. E. 2d 48.

[fol. 31] Here, the real gravamen of the offense charged against the defendants, under Code, § 20-58, was their cohabitation as man and wife in this state, following their departure from the state to evade Virginia law, their marriage in another jurisdiction and their return to Virginia. Without such cohabitation, there would have been

no offense for which they could have been tried, notwithstanding their other actions.

When the defendants' sentences were suspended, the purpose which the trial court should reasonably have sought to serve was that the defendants not continue to violate Code, § 20-58. The condition reasonably necessary to achieve that purpose was that the defendants not again cohabit as man and wife in this state. There is nothing in the record concerning the defendants' backgrounds or the circumstances of the case to indicate that anything more was necessary to secure the defendants' rehabilitation and to accomplish the purposes envisioned by Code, § 53-272.

It was, therefore, unreasonable to require that the defendants leave the state and not return thereafter together or at the time time. Such unreasonableness renders the sentences void and they will, accordingly, be vacated and set aside. The case will be remanded to the trial court with [fol. 32] directions to re-sentence the defendants in accordance with Code, § 20-59, attaching to the suspended sentences, to be imposed upon the defendants, conditions not inconsistent with the views expressed in this opinion.

In this connection, although it has not been alluded to by either side to this controversy, it should be noted that Code, § 20-59 provides for a sentence in the penitentiary, and not in jail, as called for in the sentencing order of the trial court.

That portion of the order appealed from upholding the constitutionality of Code, §§ 20-58 and 20-59, and the convictions of the defendants thereunder, is affirmed; that portion of said order upholding the validity of the sentences imposed upon the defendants is reversed, and the case is remanded for further proceedings.

Affirmed in part, reversed in part and remanded.

[fol. 33]

IN THE SUPREME COURT OF APPEALS
OF THE SUPREME COURT OF APPEALS

Record No. 6163

RICHARD PERRY LOVING and MILDRED JETER LOVING,
Plaintiffs in error,

against

COMMONWEALTH OF VIRGINIA, Defendant in error.

MANDATE—March 7, 1966

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Caroline County on the 22nd day of January, 1965.

This day came as well the plaintiffs in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in part in the judgment complained of. It is therefore adjudged and ordered that the said judgment, in so far as it upholds the constitutionality of Code, §§ 20-58 and 20-59, and the convictions of the plaintiffs in error thereunder, be, and the same is hereby, affirmed; and in so far as it upholds the validity of the sentences imposed upon the plaintiffs in error, be, and the same is hereby, reversed and set aside, and the case is remanded to the said circuit court for further proceedings in accordance with the views expressed in the said written opinion of this court.

Which is ordered to be forthwith certified to the said circuit court.

[fol. 34] Motion for stay and order thereon (omitted in printing).

[fol. 37]

IN THE SUPREME COURT OF APPEALS
OF THE COMMONWEALTH OF VIRGINIA

Record No. 6163

RICHARD PERRY LOVING and MILDRED JETER LOVING,
Appellants,

v.

COMMONWEALTH OF VIRGINIA, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed May 31, 1966

I. Notice is hereby given that Richard Perry Loving and Mildred Jeter Loving, the appellants above named, hereby appeal to the Supreme Court of the United States from the final Order of this, the Supreme Court of Appeals of Virginia, entered herein on March 7, 1966, affirming the decision of the Circuit Court of Caroline County entered on January 22, 1965, which decision denied the appellants' motion to vacate the judgment and set aside the sentence, and further, affirming the judgment of conviction originally entered by the Circuit Court of Caroline County on January 6, 1959.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

Appellants, Richard Perry Loving, a White person, and Mildred Jeter Loving, a Negro person, were convicted for "unlawfully and feloniously go[ing] out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia . . . [and] cohabiting as man and wife against the peace and dignity of the Commonweath". §§ 20-58, 20-59 of the 1950 Code [fol. 38] of Virginia as amended. They were each sentenced to one year in jail, which sentences were suspended "for a period of twenty-five years upon the provision that both

accused leave Caroline County and the State of Virginia at once and do not return together or at the same time to said County and State for a period of twenty-five years". The convictions were affirmed, but the sentences were reversed by the Virginia Supreme Court of Appeals as part of the judgment appealed from herein. Your appellants are presently free because the execution of the judgment of the Virginia Supreme Court of Appeals has been stayed by that Court until the final determination of their convictions by the United States Supreme Court.

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Both of the Warrants of Arrest for Criminal Dockets No. 928 and 929.

2. The True bill returned by the grand jurors of the Commonwealth of Virginia at the October 1958 term.

3. The Order which carries the heading "Indictment for a Felony" which is signed by Leon M. Bazile, Judge, and dated the 6th of January, 1959 and which is entered in Common Law Order Book 14, page 161.

4. The motion to vacate judgment and set aside sentence filed on the 6th of November, 1963.

5. The ten page undated written opinion signed by Leon M. Bazile, Judge.

[fol. 39] 6. The Order entered on 22 January 1965, signed by Judge Leon M. Bazile.

7. The Notice of Appeal and Assignments of Error, filed on March 3, 1965.

8. The Writ of Error and Supersedeas granted in this matter on June 11, 1965, together with the clerk's certificate thereof on June 14, 1965.

9. The Opinion by Justice Harry L. Carrico rendered in this matter on March 7, 1966.

10. Appellants' Motion for Stay of March 24, 1966.

11. The Order Staying Execution of Judgment of March 28, 1966.

12. This Notice of Appeal.

III. The following questions are presented by this appeal:

1. Do the Virginia anti-miscegenation laws (§ 20-50 et seq. of the 1950 Code of Virginia as amended) violate the due process and equal protection clauses of the 14th Amendment to the United States Constitution?

2. Does a state statute which proscribes marriage between members of different races violate constitutional rights of privacy?

3. Does a state statute which proscribes marriage between members of different races violate a constitutional right of freedom to marry?

4. Is a state law valid under our Constitution which makes the color of a person's skin the test of whether his marriage constitutes a criminal offense?

[fol. 40] 5. Do the Virginia anti-miscegenation statutes deprive the appellants of the civil rights guaranteed by § 1981 of Title 42 of the U.S. Code?

Richard Perry Loving and Mildred Jeter Loving,
By Counsel;
Bernard S. Cohen, Philip J. Hirschkop, Lainof,
Cohen & Cohen, Esqs.;
Attorneys for Appellants, 1513 King Street, Alexandria, Virginia, By: Bernard S. Cohen.

Of Counsel:

Melvin Wulf, Esq., American Civil Liberties Union, 156 Fifth Avenue, New York, New York.

Proof of Service

I, Bernard S. Cohen, one of the attorneys for Richard Perry Loving and Mildred Jeter Loving, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of May, 1966, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, on the Commonwealth of Virginia, by mailing copies in duly addressed envelopes, with first-class postage prepaid, to Robert Y. Button, the Attorney General for the Commonwealth of Virginia and to R. D. McIlwaine, III, Assistant Attorney General for the Commonwealth of Virginia.

Bernard S. Cohen, Attorney for Richard Perry Loving and Mildred Jeter Loving, 1513 King Street, Alexandria, Virginia.

[fol. 41]

SUPREME COURT OF THE UNITED STATES

No. 395—OCTOBER TERM, 1966

RICHARD PERRY LOVING, et ux., Appellants,

v.

VIRGINIA.

Appeal from the Supreme Court of Appeals of the Commonwealth of Virginia.

ORDER NOTING PROBABLE JURISDICTION—December 12, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 395

In the Matter of the Application

—of—

RICHARD PERRY LOVING and MILDRED DELORES JETER LOVING

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

RICHARD PERRY LOVING and MILDRED DELORES JETER LOVING,

Appellants,

—v.—

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF APPEALS OF VIRGINIA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Appeals of Virginia of March 7, 1966, affirming the decision of the Circuit Court of Caroline County entered on January 22, 1965, which denied the appellants' Motion to Vacate Judgment and Set Aside Sentence and affirmed the judgment of conviction originally entered by the Circuit Court of Caroline County on January 6, 1959. Appellants submit this statement to show that this Court has jurisdiction of the appeal and that substantial federal questions are presented.

Citation to Opinion Below

The Judgment Order entered by the Circuit Court of Caroline County, Virginia on January 22, 1965, was accompanied by a written opinion (R-8). That opinion, which is not officially reported, is set out in the Appendix, *infra*, pp. 33-42. The opinion of the Supreme Court of Appeals of Virginia is reported at 206 Va. 924, 147 S. E. 2d 78 (1966) (R-19) and is set out in the Appendix, *infra*, pp. 21-30.

Jurisdiction

Appellants were convicted in the Circuit Court of Caroline County, Virginia, on January 6, 1959, of violating Virginia's anti-miscegenation statutes. Va. Code §§ 20-50 through 20-60 (1950). While neither the informations nor grand jury indictments refer to specific sections of the Virginia Code they incorporate language from Va. Code § 20-58 which is entitled "Leaving State to evade law." Appellants filed a Motion to Vacate Judgment and Set Aside Sentence on November 6, 1963 (R-6). The Circuit Court of Caroline County issued its written opinion and order on January 22, 1965 (R-8).

Appellants filed their Notice of Appeal and Assignments of Error on March 2, 1965 (R-15) and their Petition for a Writ of Error and Supersedeas in the Supreme Court of Appeals of Virginia on May 17, 1965. The Writ of Error and Supersedeas was granted by the Supreme Court of Appeals of Virginia, at Richmond, on June 11, 1965 (R-1). On March 7, 1966 the Supreme Court of Appeals of Virginia affirmed the convictions of the appellants, set aside their

sentences, and remanded for further sentencing not inconsistent with the opinion (R-33). On March 28, 1966, the Supreme Court of Appeals of Virginia issued an Order staying execution of its judgment of March 7, 1966, in order that the appellants "may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for appeal to review the judgment of this Court" (R-36).

The notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Appeals of Virginia on May 31, 1966 (R-37).

Jurisdiction of this Court on appeal rests upon 28 U. S. C. § 1257 (2). *Williams* v. *Bruffy*, 96 U. S. 176 (1877); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965).

Constitutional and Statutory Provisions Involved

1. Petitioners were convicted of violating Va. Code § 20-58 (1950) (Vol. 4, p. 491), which provides:

> § 20-58. Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage. (Code 1919, §§ 4540, 5089.)

2. The case also specifically involves Va. Code § 20-54 (1950) (Vol. 4, p. 489), which provides:

> § 20-54. Intermarriage prohibited; meaning of term 'white persons.'—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter. (1924, p. 535; Michie Code 1942, § 5099a.)

3. The case also specifically involves Va. Code § 20-59 (1950) (Vol. 4, p. 492), which provides:

> § 20-59. Punishment for marriage.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years. (Code 1919, § 4546; 1932, p. 68.)

4. The case also specifically involves Va. Code § 1-14 (Supp. 1964) (Vol. 1, p. 12), which provides:

> § 1-14. Colored persons and Indians defined.—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth

> or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians. (Code 1919, § 67; 1930, p. 97; 1954, c. 702.)

5. This case also involves the First and Ninth Amendments, the first section of the Fourteenth Amendment to the Constitution of the United States, and 42 U. S. C. 1981, which provides:

> § 1981. Equal rights under the law.—All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. R. S. § 1977.

Questions Presented

1. Do the Virginia anti-miscegenation laws (Va. Code §§ 20-50 et seq. (1950) and Va. Code § 1-14 (Supp. 1964)) violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

2. Does a state statute which proscribes marriage between members of different races violate the constitutional right of privacy?

3. Does a state statute which proscribes marriage between members of different races violate a constitutional right of freedom to marry?

4. Is a state law valid under our Constitution which makes the color of a person's skin the test of whether his marriage constitutes a criminal offense?

5. Do the Virginia anti-miscegenation statutes deprive the appellants of the civil rights guaranteed by Title 42 U. S. C. § 1981?

Statement of the Case

On or about the 2nd day of June, 1958, Mildred Jeter, a "colored person," and Richard Perry Loving, a "white person," were lawfully married in the District of Columbia, pursuant to the laws of the District. Shortly after their marriage appellants returned to Virginia and established their marital abode. On the 11th day of July, 1958, warrants were issued charging appellants with attempting to evade the Virginia ban on interracial marriages. Va. Code § 20-58 (1950) (R-2). During the 1958 October Term of the Grand Jury of Caroline County, they were indicted for this offense and on January 6th, 1959, they entered a plea of guilty. The following sentence was imposed:

> The court doth accept the pleas of 'guilty' and fix the punishment of both accused at one year each in jail. The court does suspend said sentence for a period of twenty-five years upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years (R-6).

During the period from the time of their conviction until approximately the summer of 1963, the Lovings took up residence in the District of Columbia. Shortly thereafter they retained counsel who, on the 6th day of November, 1963, filed a motion in the Circuit Court of Caroline County to vacate the judgment and set aside the sentence (R-6). On October 28, 1964, a class action was filed by the appellants in the United States District Court for the Eastern District of Virginia, requesting that a three-judge

federal court be convened to declare Va. Code §§ 20-50 through 20-60 unconstitutional and to enjoin the state officials from enforcing the appellants' prior convictions. On January 22nd, 1965, Judge Bazile of the Circuit Court of Caroline County entered an Order denying appellants' prior Motion to Vacate Judgment and Set Aside the Sentence. On February 11, 1965 the three-judge federal court (Judges Bryan, Butzner and Lewis) entered an interlocutory order continuing the matter so that the appellants herein might have a reasonable time to "submit [the] issue [therein] to the state courts for final determination." Since the summer of 1963 and during the pendency of all court proceedings since that time, the Lovings have continued to reside in Virginia, safe from further arrest and prosecution only because the three-judge federal court's interlocutory order stated that:

> . . . in the event the plaintiffs [Lovings] are taken into custody in the enforcement of the said judgment and sentence, this court, under the provisions of title 28, section 1651, United States Code should grant the plaintiffs bail in a reasonable amount during the pendency of the State proceedings in the State Courts and in the Supreme Court of the United States, if and when the case should be carried there. . . .

How the Federal Questions Were Raised and Decided

No federal questions were raised at the time the appellants were originally brought to trial in 1959. However, on November 6, 1963, counsel for appellants filed a Motion to Vacate Judgment and Set Aside Sentence in the trial court (R-6). Under Virginia law a suspended sentence remains within the jurisdiction of the trial court during the period of suspension. *Richardson* v. *Commonwealth,* 131 Va. 802, 109 S. E. 460 (1921). Such a motion was therefore timely and part of the trial court proceedings.

The following specific federal questions were raised in that motion:

> Said sentence constitutes banishment and is thus a violation of constitutional due process of law.
>
> Said sentence is improper because it is based on a statute which is unconstitutional on its face, in that it denies the defendants the equal protection of the laws and denies the right of marriage which is a fundamental right of free men, in violation of § 1 of the Virginia Constitution and the Fourteenth Amendment of the Federal Constitution.
>
> Said statute and said sentence are unconstitutional burdens upon interstate commerce (R-7).

The written opinion of the trial court dealt specifically with each of the points raised in the Motion. The trial court said, "It is next contended that these statutes are unconstitutional in violation of § 1 of the Virginia Constitution and the Fourteenth Amendment of the United States

Constitution." The Court held that "there is nothing in . . . the Fourteenth Amendment which has anything to do with this subject here under consideration" (R-11). The trial court further held that "Marriage has nothing to do with interstate commerce. There is nothing more domestic than marriage; and this contention is without merit" (R-13).

On January 22, 1965, the trial Judge entered an Order denying the Motion to Vacate Judgment and Set Aside the Sentence, for reasons stated in the written opinion quoted above (R-8).

On appeal, the assignments of error alleged that the Court erred in holding that the anti-miscegenation statutes did not violate the due process and equal protection clauses of the Fourteenth Amendment to the federal Constitution. Further error was alleged in holding that the sentence and suspension was not a violation of due process of law.

In affirming the conviction, the Supreme Court of Appeals of Virginia squarely considered the constitutionality of the anti-miscegenation statutes. The Court stated:

> The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law. *Loving* v. *Commonwealth,* 206 Va. 924, 926, 147 S. E. 2d 78, 80 (1966) (R-21).

The Court went on to hold that "That portion of the order appealed from upholding the constitutionality of Code,

§§ 20-58 and 20-59, and the convictions of the defendants thereunder, is affirmed . . . " (R-32).

Appellants' brief in the Supreme Court of Appeals of Virginia argued that the anti-miscegenation statutes were unconstitutional in that they denied the appellants equal protection of the laws and due process of the laws. The State's brief argued that the law was not violative of the Fourteenth Amendment.

The Questions Presented Are Substantial

This case presents the important constitutional question of the application of the due process and equal protection clauses of the Fourteenth Amendment to anti-miscegenation statutes.

I.

The statutes involved are racially discriminatory and deny the appellants as individuals, and Negroes and whites as groups, the equal protection of the laws.

There can be no doubt that the conviction of the Lovings was based on race. But for the fact that Mildred Jeter was a "colored person" under Va. Code § 1-14 and Richard Loving a "white person" under Va. Code § 20-54, no crime would have been committed. Except for the difference of color, the state never raised any objection to the marriage. If both had been white or both had been other than white, the marriage would be valid. The gravamen of the appellants' claim, that the anti-miscegenation statutes violate the due process and equal protection clauses of the Fourteenth Amendment, is that it is the color of their skin

which makes their marriage criminal. Indeed, Va. Code § 20-59 makes the act a felony punishable by confinement in the penitentiary for not less than one nor more than five years.

The legislative history of the laws involved leave no doubt that their purpose is racial discrimination. The Virginia anti-miscegenation laws date back to a 1691 resolution of the Colonial Assembly entitled "An act for the suppression of outlying slaves." Act XVI, May 19, 1691; 3 Stat. at Large, p. 86 (Henning's 1823). The substance of this legislation was re-enacted with each revision of the Code, and supplemented in 1924 by the requirement that persons register with the state for pedigrees. "An act for the preservation of racial integrity," Va. Acts of Assembly, Ch. 377, p. 534 (1924) (now Va. Code § 20-50).

To this day the State of Virginia insists on enforcing the archaic principle of "separate but equal" which has been totally rejected since *Brown* v. *Board of Education*, 347 U. S. 483 (1954). Indeed, the court below ruled that "separate but equal" is a living principle which has been limited in only a few specific instances. It believes that *Brown* "cannot support a claim for the intermarriage of the races or that such intermarriage is a right which must be made available to all on equal terms." *Loving* v. *Commonwealth*, 206 Va. 924, 926, 147 S. E. 2d 78, 80 (1966) (R-24). The Virginia Supreme Court of Appeals justified its decision on the basis of *Pace* v. *Alabama*, 106 U. S. 583 (1883); *Plessy* v. *Ferguson*, 193 U. S. 537 (1896); *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749, remanded 350 U. S. 891, aff'd 197 Va. 734, 90 S. E. 2d 849, appeal dismissed 350 U. S. 985 (1955).

Where an individual is denied a right permitted to others solely on the basis of race, the equal protection clause of the Fourteenth Amendment is violated. Though racially discriminatory laws withstood early legal tests on the ground that they applied equally to persons of both races, *Pace* v. *Alabama, supra,* that theory no longer applies:

> "In this situation, *Pace* v. *Alabama, supra,* is relied upon as controlling authority. In our view, however, *Pace* represents a limited view of the Equal Protection clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin* v. *Florida,* 379 U. S. 184, 188 (1964).

In *McLaughlin, supra,* this Court held Florida's racially discriminatory fornication statute unconstitutional. In a concurring opinion, Mr. Justice Stewart, joined by Mr. Justice Douglas, indicated that he would find any state criminal statute unconstitutional which "makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin, supra* at 198.

This Court has supported that view in numerous other cases. In *Dorsey* v. *State Athletic Commission,* 359 U. S. 533 (1959), the Court affirmed *per curiam* a lower court ruling [168 F. Supp. 149 (E. D. La. 1958)] that a Louisiana statute outlawing inter-racial boxing was a denial of equal protection. The statute theoretically applied to both white and Negro boxers. In *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948), a statute which denied commercial fishing licenses to aliens ineligible for citizenship was held unconstitutional. In terms pertinent to the case at bar, the Court held in *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942):

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.

Any statute which bases the criminality of an act on race alone is a gross abuse of equal protection. As early as 1896, this Court said that criminal justice must be administered "without reference to considerations of race." *Gibson* v. *Mississippi*, 162 U. S. 565, 591 (1896). From *Buchanan* v. *Warley*, 245 U. S. 60 (1917) to *McLaughlin* v. *Florida*, 379 U. S. 184 (1964), the Court has repeatedly struck down laws imposing criminal penalties on the basis of race.

It is clearly unequal treatment and therefore a denial of equal protection to permit "white persons" to marry only "white persons," but to permit "colored persons" to marry anyone except "white persons." A person of Japanese ancestry, for example, is not included within the definition of "colored persons" [Va. Code § 1-14], or "white persons" [Va. Code § 20-54]. Thus the marriage of a Japanese person and a "white person" would be unlawful under Va. Code § 20-54 but not subject to criminal prosecution under Va. Code § 20-59, which punishes only marriages between "colored persons" and "white persons." A marriage between a Japanese person and a "colored person" would be neither unlawful nor subject to prosecution. Certainly this is not equal protection and the Virginia legislature, in passing an "Act for the Preservation of Racial Integrity," *supra*, was not concerned with the equal protection of the "integrity" of the Negro race. That being true,

the statutes are unconstitutional devices which stamp one group of citizens inferior. These statutes are relics of slavery which deny equality under the law. Cf. *Brown* v. *Board of Education,* 347 U. S. 483 (1954); *Goss* v. *Board of Education,* 373 U. S. 683 (1963); *Johnson* v. *Virginia,* 373 U. S. 61 (1963).

II.

Appellants were denied due process of law.

"If the right to marry is a fundamental right, then it must be conceded that an infringement of that right by means of a racial restriction is an unlawful infringement of one's liberty." *Perez* v. *Sharp,* 32 Cal. 2d 711; 198 P. 2d 17, 31 (1948) (*sub nom. Perez* v. *Lippold*). Appellants maintain that marriage is such a basic, fundamental and natural right and that the choice of a mate must be left to one's own desires and conscience. These desires cannot be infringed by the state setting standards which unreasonably and arbitrarily apply racial criteria. This principle is supported by *McLaughlin, supra* at 192.

> Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by the white person and a Negro, but not otherwise.

The traditional test for the reasonableness of a "police powers" statute is given in *Nebbia* v. *New York,* 291 U. S. 502, 525 (1934). "[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have

a real and substantial relation to the object sought to be attained."

Given the decisions by this Court in *Brown* v. *Board of Education, supra,* and its progeny, a statute which makes legal distinctions solely on the basis of race are presumptively unconstitutional. See e.g., *Hamm* v. *Virginia State Board of Elections,* 230 F. Supp. 156 (E. D. Va.), aff'd *per curiam* 379 U. S. 19 (1964); *Dorsey* v. *State Athletic Commission,* 359 U. S. 533 (1959); *Oyama* v. *California,* 332 U. S. 633 (1948); *Takahashi* v. *Fish & Game Commission,* 334 U. S. 410 (1948); *Shelley* v. *Kraemer,* 334 U. S. 1 (1948).

It is now unquestionable that the sacraments of marriage are beyond the arbitrary grasp of the state. *Meyer* v. *Nebraska,* 262 U. S. 390 (1922); *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942). In *Meyer* this Court, speaking of liberty under the Fourteenth Amendment, said that "without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children. . . ."

The First and Ninth Amendments as applied to the states through the Fourteenth Amendment further guarantee an inherent right of freedom in marriage.

> [T]he First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" . . . [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the first

amendment is one. . . . *Griswold* v. *Connecticut*, 381 U. S. 479, 483-484 (1965).

To hold that a right so basic and fundamental and so deep rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments . . . or elsewhere in the Constitution would violate the Ninth Amendment. *Griswold, supra* at 491 (concurring opinion).

III.

The statutes involved violate 42 U. S. C. § 1981.

In addition to the equal protection rights individually denied to the appellant, Mildred Jeter Loving, she has been denied the civil rights guaranteed by § 1981 of Title 42 of the United States Code.

She has been denied the right "to make and enforce contracts" in the same manner as a white citizen. She has been denied "the full and equal benefit of all laws and proceedings" as is enjoyed by white citizens. Section 20-53 of the Virginia Code violates 42 U. S. C. § 1981 by denying to Mildred Jeter Loving, a "colored person," a license that would be granted to a "white person" applying to marry another "white person." Similarly, Richard Perry Loving has been denied the right to marry a "colored person," a license that would be granted to an Indian, an oriental, or any other person not white. Conviction by the State of Virginia under the challenged sections of the Virginia Code has subjected appellants to "punishments, pains, penalties and exactions" which would not have visited upon a "white person" marrying another "white person," or a "colored person" marrying another "colored person."

Mr. Justice White took notice of this in *McLaughlin, supra* at 192:

> We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure 'the full and equal benefit of all laws and proceedings for the security of persons and property' and to subject all persons 'to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' 42 U. S. C. § 1981 (1958), R. S. Sec. 1977.

IV.

The effects of the statutes.

The anti-miscegenation statutes deny appellants and numerous others similarly situated in Virginia and 17 other states many rights and benefits contingent upon the marital relationship. They are prohibited from establishing a family abode and raising their children in places where they and their family have often been long established and where many blood relatives still reside. Their children live under the stigma of bastardy. Victims of these statutes are prejudiced in their right to certain tax, insurance, social security, and workman's compensation benefits; to bequeath or inherit property; to certain criminal defenses, and other benefits and privileges too numerous to mention.

Under 42 U. S. C. § 416(h)(1) the determination of the eligibility of an applicant for Social Security benefits is governed by the ". . . devolution of intestate personal prop-

erty by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such individual is dead, by the courts of the State in which he was domiciled at the time of his death. . . ."

Under Va. Code § 64-7, "The issue of marriages deemed null in law or dissolved by a court shall nevertheless be legitimate." However, the offspring of miscegenous marriages are specifically excluded from the terms of this statute. *Greenhow* v. *James*, 80 Va. 636 (1885). Therefore, the children of miscegenous marriages are prejudiced from taking their rightful and deserved share of estates according to Virginia law of devolution of intestate property, and live under the stigma of bastardy.

Under Va. Code § 18.1-45, marriage to the victim is deemed a defense or factor in mitigation of punishment for statutory rape. The anti-miscegenation laws of Virginia prejudice Negroes and whites, as groups, from the benefits of this statute. Furthermore, there is no right not to testify against a spouse for persons subject to these statutes.

Under the anti-miscegenation statutes, appellants are precluded from sharing in benefits under workman's compensation, that are contingent upon a marital relationship. *Toler* v. *Oakwood Smokeless Coal Corp.*, 173 Va. 425, 4 S. E. 2d 364 (1939). The appellants, as individuals, and whites and Negroes, as groups, are also prejudiced from taking advantage of the benefits of joint income tax returns. Furthermore, appellants are also denied and prejudiced from taking advantage of the rights and benefits of private insurance and social welfare benefits that are contingent upon the marital relationship.

All persons who enter into miscegenous marriages and either live in *or move into* Virginia are similarly situated. (See *Calma* v. *Calma,* 203 Va. 880, 128 S. E. 2d 440 (1962).)

CONCLUSION

It is submitted that the decision of the Supreme Court of Appeals of Virginia erroneously upheld the constitutionality of the statutes involved; that the questions presented are so substantial as to require plenary consideration for their resolution, and upon consideration thereof the Court should reverse the judgment below.

Respectfully submitted,

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APPENDIX

The trial court fixed "the punishment of both accused at one year each in jail." (Code, § 20-59.)[2] The court suspended the sentences "for a period of twenty-five years upon the provision that both accused leave Caroline County and the state of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years."

On November 6, 1963, the defendants filed a "Motion to Vacate Judgment and Set Aside Sentence" alleging that they had complied with the terms of their suspended sentences but asserting that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid.

The court denied the motion by an order entered on January 22, 1965, and to that order the defendants were granted this writ of error.

There is no dispute that Richard Perry Loving is a white person and that Mildred Jeter Loving is a colored person within the meaning of Code, § 20-58. Nor is there any dispute that the actions of the defendants, as set forth in the indictment, violated the provisions of Code, § 20-58.

The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative

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out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

[2] "§ 20-59. *Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law.

The problem here presented is not new to this court nor to other courts, both state and federal, throughout the country. The question was most recently before this court in 1955, in *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749, remanded 350 U. S. 891, 100 L. ed. 784, 76 S. Ct. 151, affd. 197 Va. 734, 90 S. E. 2d 849, app. dism. 350 U. S. 985, 100 L. ed. 852, 76 S. Ct. 472.

In the *Naim* case, the Virginia statutes relating to miscegenation marriages were fully investigated and their constitutionality was upheld. There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The lone exception, it was noted, was the California Supreme Court which declared the California miscegenation statutes unconstitutional in *Perez* v. *Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. *Perez* v. *Lippold*).

The *Naim* opinion, written for the court by Mr. Justice Buchanan, contains an exhaustive survey and citation of authorities, both case and text from both state and federal sources, upon the subject of miscegenation statutes. It is not necessary to repeat all those citations in this opinion because the defendants concede that the *Naim* case, if given effect here, is controlling of the question before us. They urge us, however, to reverse our decision in that case, contending that the decision is wrong because the judicial authority upon which it was based no longer has any validity. Our inquiry must be, therefore, whether a change in the *Naim* decision is required.

The defendants say that the *Naim* opinion relied upon *Plessy* v. *Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 S. Ct. 1138, but argue that the United States Supreme Court reversed the *Plessy* decision in *Brown* v. *Board of Education*, 347 U. S. 483, 98 L. ed. 873, 74 S. Ct. 686.

The *Plessy* case, decided in 1896, involved an attack upon the constitutionality of a Louisiana statute requiring separate railway carriages for the white and colored races. The statute was upheld by the Supreme Court under the "separate but equal" doctrine there enunciated by the court.

In the *Brown* case, decided in 1954, the Supreme Court ruled "that in the field of public education the doctrine of 'separate but equal' has no place" and that "Any language in *Plessy* v. *Ferguson* contrary to this finding is rejected" 98 L. ed., at p. 881.

The *Plessy* case was cited in the *Naim* opinion to show that the United States Supreme Court had made no decision at variance with an earlier holding by the Tenth Circuit Court of Appeals in *Stevens* v. *United States*, 146 F. 2d 120, that "a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."

The *Naim* opinion contained a quotation from the *Plessy* case that "Laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the state." Nothing was said in the *Brown* case which detracted in any way from the effect of the language quoted from the *Plessy* opinion. As Mr. Justice Buchanan pointed out in the *Naim* opinion, the holding in the *Brown* case, that the opportunity to acquire an education "is a right which must be made available to all on equal terms," cannot support a claim for the intermarriage of

the races or that such intermarriage is a "right which must be made available to all on equal terms."

The United States Supreme Court itself has indicated that the *Brown* decision does not have the effect upon miscegenation statutes which the defendants claim for it. The *Brown* decision was announced on May 17, 1954. On November 22, 1954, just six months later, the United States Supreme Court denied certiorari in a case in which Alabama's statute forbidding intermarriage between white and colored persons had been upheld against the claim that the statute denied the Negro appellant "her constitutional right and privilege of intermarrying with a white male person," and that it violated the Privileges and Immunities, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. *Jackson* v. *State*, 37 Ala. App. 519, 72 So. 2d 114, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U. S. 888, 99 L. ed. 698, 75 S. Ct. 210.

The defendants also say that the *Naim* opinion relied upon *Pace* v. *Alabama*, 106 U. S. 583, 27 L. ed. 207, 1 S. Ct. 637, but contend that the United States Supreme Court overruled the *Pace* decision in *McLaughlin* v. *Florida*, 379 U. S. 184, 13 L. ed. 2d 222, 85 S. Ct. 283.

The *Pace* case, decided in 1883, involved an attack upon the constitutionality of an Alabama statute imposing a penalty for adultery or fornication between a white person and a Negro. Another statute provided a lesser penalty "If any man and woman live together in adultery or fornication." A white woman and Pace, a Negro, were convicted and sentenced under the first statute "for living together in a state of adultery or fornication." Pace appealed, claiming that the statute under which he had been convicted was violative of the Fourteenth Amendment. The court rejected this claim, holding that "Whatever discrimination is made in the punishment prescribed in the two sections is directed

against the offense designated and not against the person of any particular color or race." 27 L. ed., at p. 208.

In the *McLaughlin* case, decided in 1964, the Supreme Court had under review a Florida statute which made it unlawful for a white person and a Negro, "not married to each other," to "habitually live in and occupy in the night time the same room." The statute in dispute provided for a different burden of proof and a different penalty than were provided by other statutes relating to adultery and fornication generally. Florida sought to sustain the validity of the statute under the holding in *Pace* v. *Alabama*. The court, however, ruled the Florida statute invalid, saying of *Pace* v. *Alabama* that it "represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." 13 L. ed. 2d, at p. 226.

The *Pace* case, like the *Plessy* case, was cited in the *Naim* opinion to show that the United States Supreme Court had made no decision at variance with the rule that a state may validly forbid interracial marriages. The *McLaughlin* decision detracted not one bit from the position asserted in the *Naim* opinion.

Both parties to the *McLaughlin* controversy cited Florida's miscegenation statute, making it unlawful for a white person to marry a Negro. McLaughlin contended that the miscegenation statute was unconstitutional because it prevented him from asserting, against the cohabitation charge, the defense of common law marriage. Florida argued that it was necessary that its cohabitation statute be upheld so as to carry out the purposes of its miscegenation statute which, it contended, was "immmune from attack under the Equal Protection Clause." The court ruled that it was unnecessary to consider McLaughlin's contention in this respect because the court was holding in his favor on the

cohabitation statute. As for Florida's contention, the court said that, for purposes of argument, the constitutionality of the miscegenation statute would be assumed and that it was deciding the case "without reaching the question of the validity of the State's prohibition against interracial marriage." 13 L. ed. 2d, at p. 230.

The defendants direct our attention to numerous federal decisions in the civil rights field in support of their claims that the *Naim* case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law.

We have given consideration to these decisions, but it must be pointed out that none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized—that there is an overriding state interest in the institution of marriage. None of these decisions takes away from what was said by the United States Supreme Court in *Maynard* v. *Hill,* 125 U. S. 190, 31 L. ed. 654, 657, 8 S. Ct. 723:

> "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature."

The defendants also refer as to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the *Naim* decision is erroneous and that such marriages should not be forbidden by law.

A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term.

Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate.

Our one and only function in this instance is to determine whether, for sound judicial considerations, the *Naim* case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case. According that decision all of the weight to which it is entitled under the doctrine of *stare decisis*, we hold it to be binding upon us here and rule that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States.

We turn now to the other contention of the defendants—that the sentences imposed upon them are unreasonable and void.

It will be recalled that the trial court suspended the sentences of the defendants for a period of twenty-five years upon the condition that they leave the county and state "at once and do not return together or at the same time to said county and state for a period of twenty-five years."

The defendants first say that the effect of the sentences was to banish them from the state. They refer us to the case of *State* v. *Doughtie*, 237 N. C. 368, 74 S. E. 2d 922, where it was held that "banishment . . . is impliedly prohibited by public policy . . . A sentence of banishment is undoubtedly void."

Although the defendants were, by the terms of the suspended sentences, ordered to leave the state, their sentences did not technically constitute banishment because they were permitted to return to the state, provided they did not return together or at the same time.

Thus, we do not agree with the defendants' contention that the sentences are void because they constitute banishment. We do agree with their further contention, however, that the conditions of the suspensions are so unreasonable as to render the sentences void.

The trial court acted under the authority of Code, § 53-272 in suspending the sentences of the defendants. The purpose of this statute is to secure the rehabilitation of the offender, enabling him to repent and reform so that he may be restored to a useful place in society. *Marshall* v. *Commonwealth,* 202 Va. 217, 219, 116 S. E. 2d 270; *Slayton* v. *Commonwealth,* 185 Va. 357, 365-366, 38 S. E. 2d 479; *Wilborn* v. *Saunders,* 170 Va. 153, 160-161, 195 S. E. 723.

To effect this statutory purpose, the courts are authorized to impose conditions upon the suspension of execution or imposition of sentence. But such conditions must be reasonable, having due regard to the nature of the offense, the background of the offender and the surrounding circumstances. *Dyke* v. *Commonwealth,* 193 Va. 478, 484, 69 S. E. 2d 483.

Here, the real gravamen of the offense charged against the defendants, under Code, § 20-58, was their cohabitation as man and wife in this state, following their departure from the state to evade Virginia law, their marriage in another jurisdiction and their return to Virginia. Without such cohabitation, there would have been no offense for which they could have been tried, notwithstanding their other actions.

When the defendants' sentences were suspended, the purpose which the trial court should reasonably have sought to serve was that the defendants not continue to violate Code, § 20-58. The condition reasonably necessary to achieve that purpose was that the defendants not again cohabit as man and wife in this state. There is nothing in the record concerning the defendants' backgrounds or the circumstances of the case to indicate that anything more was necessary to secure the defendants' rehabilitation and to accomplish the purposes envisioned by Code, § 53-272.

It was, therefore, unreasonable to require that the defendants leave the state and not return thereafter together or at the same time. Such unreasonableness renders the sentences void and they will, accordingly, be vacated and set aside. The case will be remanded to the trial court with directions to re-sentence the defendants in accordance with Code, § 20-59, attaching to the suspended sentences, to be imposed upon the defendants, conditions not inconsistent with the views expressed in this opinion.

In this connection, although it has not been alluded to by either side to this controversy, it should be noted that Code, § 20-59 provides for a sentence in the penitentiary, and not in jail, as called for in the sentencing order of the trial court.

That portion of the order appealed from upholding the constitutionally of Code, §§ 20-58 and 20-59, and the convictions of the defendants thereunder, is affirmed; that portion of said order upholding the validity of the sentences imposed upon the defendants is reversed, and the case is remanded for further proceedings.

Affirmed in part, reversed in part and remanded.

Order of the Supreme Court of Appeals for Virginia

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 7th day of March, 1966.

Record No. 6163

RICHARD PERRY LOVING and MILDRED JETER LOVING,

Plaintiffs in error,

against

COMMONWEALTH OF VIRGINIA,

Defendant in error.

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of Caroline County on the 22nd day of January, 1965.

This day came as well the plaintiffs in error, by counsel, as the Attorney General on behalf of the Commonwealth, and the court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in part in the judgment complained of. It is therefore adjudged and ordered that the said judgment, in so far as it upholds the constitutionality of Code, §§ 20-58 and 20-59, and the convictions of the plaintiffs in error thereunder, be, and the same is hereby, affirmed; and in so far as it upholds the

validity of the sentences imposed upon the plaintiffs in error, be, and the same is hereby, reversed and set aside, and the case is remanded to the said circuit court for further proceedings in accordance with the views expressed in the said written opinion of this court.

Which is ordered to be forthwith certified to the said circuit court.

A Copy,

Teste:

/s/ (Illegible)
Clerk

Opinion of the Circuit Court of Caroline County

COMMONWEALTH v. RICHARD PERRY LOVING and MILDRED DELORES JETER

BERNARD S. COHEN, for the Petitioner
PEYTON FARMER, Commonwealth Attorney

The Petitioners here were indicted in this Court at the October term, 1958, the indictment charging that on the 2nd day of June, 1958, "that Richard Perry Loving being a white man and the said Mildred Delores Jeter being a colored person did unlawfully go out of the State of Virginia for the purpose of being married and with the intention of returning to the State of Virginia, and were married out of the State of Virginia, to-wit in the District of Columbia on the 28th day of June, 1958 and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth."

On the 6th day of January, 1959, the accused were arraigned and after pleading not guilty withdrew said plea and pleaded guilty; thereupon the Court fixed their punishment at one year in jail; and then suspended said sentence for twenty-five years "upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years." After they paid the costs they were released from custody and further recognizance.

The Court file contains his birth certificate which shows that he is white and her birth certificate which shows that she is colored.

On the 6th day of November, 1963, they filed a motion to vacate the judgment and set aside the sentence.

1st It is contended the said sentence constitutes a cruel and unusual punishment within Section 9 of the Constitution of Virginia.

Section 9 of George Mason's Bill of Rights made a part of the Constitution of 1776 is in the identical same words as Section 9 of the Bill of Rights to the present Constitution (9 Henrys Statutes 111; Code of 1950, page 443).

In *Hart* v. *Commonwealth,* 131 Va., 726, 741, 109 S. E. 582, the Court said: "It has been uniformly held by this Court that the provisions in question which have remained the same as they were originally adopted in the Virginia Bill of Rights of 1776, must be construed to impose no limitation upon the right to determine and prescribe by statute the quantum of punishment deemed adequate by the legislature. That the only limitation so imposed is upon the mode of punishments, such punishments only being prohibited by such constitutional provision as were regarded as cruel and unusual when such provision of the Constitution was adopted in 1776, namely, such bodily punishments as involve torture or lingering death, such as are inhumane and barbarous, as for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like. *Aldridge's case,* 2 Va. Cas. 447, 449-450; *Wyatt's Case,* 6 Rand (27 Va.) 694; *Bracey's Case,* 119 Va. 867, 862, 89 S. E. 144.

See also *Buck* v. *Bell,* 143 Va. 310, 319, 130 S. E. 516 (1925).

In *Aldridge's Case* (2 Va. Case 447, 448) (1824) a free person of color was convicted of the larceny of bank notes. He was sentenced to be whipped, sold and transported

beyond the bounds of the United States. The Court said "as to the ninth section of the Bill of Rights, denouncing cruel and unusual punishments, we have no notion that it has any bearing on this case."

In *Wyatt's Case* (6 Rand 694) (1825), the law provided "that when any person was convicted of any crime or offense now punishable by imprisonment in the penitentiary the Court could sentence such person to be imprisoned not exceeding two years in the jail of the County or Corporation where such conviction shall have taken place, for a period not exceeding six months, nor less than one month and he shall be punished by stripes at the discretion of the Court to be inflicted at one time provided the same do not exceed thirty-nine at any one time."

"The Court said the punishment of offenses by stripes is certainly odious, but cannot be said to be unusual."

The Court said 6 Rand 763 "This Court is of the opinion and doth decide that the motion in arrest of judgment and also the motion for a new trial ought to be overruled and the judgment should be rendered against the defendant of imprisonment and stripes according to law."

In *Buck* v. *Bell,* 143 Va. 310, 130 S. E. 516 (1925) a case in which it had been ordered that Buck be sterilized, it was contended that it violated the Federal Constitution and Sections 9, 11 of the Virginia Constitution and the 11th Amendment to the Federal Constitution. The Court held that the Sterilization Act did not violate any section of the Constitution of Virginia or any sections of the Federal Constitution.

In Re Kemmler, 136 U. S. 436, 34 *Fed.* 519 (1889) it was held that punishments are cruel when they involve torture or a lingering death but the punishment of death is not within the meaning of that word in the Constitution.

The Court said that cruel and unusual punishments are "such as burning at the stake, crucifixion, breaking on the wheel or the like." (34 Fed. 524)

And the Supreme Court of the United States has held in *Onell* v. *Vermont* that whether a punishment is cruel and unusual within the provisions of a State Constitution does not present a Federal question.

In U. S. Supreme Court Enc. of U. S. Supreme Court Volume 4 p. 513, it is said "The provision of the 8th Amendment that excessive fines shall not be imposed nor cruel and unusual punishment inflicted applies to National and not to State legislation.

It is next said that the sentence exceeds a reasonable period of suspension within the meaning of Section 53-273 of the Code of 1950.

The Court has examined this Section with care and it sees nothing in this statute which limits the time that the person may be put on probation.

It is said that the sentence constitutes banishment and thus is a violation of due process of law.

Section 20-58 provides that "If any white person and colored person shall go out of this state for the purpose of being married and with the intention of returning and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in Section 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of this cohabitation here as man and wife shall be evidence of their marriage."

Intermarriage between white and colored persons is prohibited by Section 20-54 of the Code.

Section 20-57 of the Code provides "all marriages between a white person and a colored person shall be abso-

lutely void without any decree of divorce or other legal process."

And Section 20-58 of the Code provides "If any white person and colored person shall go out of this State for the purpose of being married and with the intention of returning and be married out of it, and shall afterwards return to reside in it, cohabiting as man and wife, they shall be punished as provided in Section 20-20 and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

These laws were held valid in *Kinney* v. *Commonwealth,* 30 Gratt, 858 (1878) Judge Christian who wrote the opinion said 30 Gratt 870): "If the parties desire to maintain the relations of man and wife, they must change their domicile and go to some State or Country where the laws recognizes the validity of such marriages."

Their marriage being absolutely void in Virginia they cannot cohabit in Virginia without incurring repeated prosecutions for that cohabitation.

It is next contended that these statutes are unconstitutional in violation of Section 1 of the Virginia Constitution and the 14th Amendment of the U. S. Constitution.

There is nothing in Section 1 of the Constitution of Virginia which relates to this matter, nor is there anything in the 14th Amendment which has anything to do with this subject here under consideration.

Marriage is a subject which belongs to the exclusive control of the States.

In *State* v. *Gibson,* 16 Ind. 180, 10 Am. Rep. 42 a statute prohibiting the intermarriage of negroes and white persons was held not to violate any provisions of the 14th Amendment or Civil Right Laws in the course of a well-

reasoned and well-supported discussion of the powers retained by and inherent in the States under the Constitution said:

> ". . . In this State marriage is treated as a civil contract, but it is more than a mere civil contract, it is a public institution established by God himself, is recognized in all Christian and Civilized nations and is essential to the peace, happiness, and well being of society. . . ."
>
> ". . . The right in the States to control, to guard, protect and preserve this God-giving, civilizing and Christianizing institution is of inestimable importance, and cannot be surrendered, nor can the States suffer or permit any interference therewith. If the Federal Government can determine who may marry in a State, there is no limit to its power. . . ." (36 Ind. at p. 402-3)

In *Naim* v. *Naim,* 197 Va. 80, 87 S. E. (2nd) 749 (1953) the Court of Appeals in a well considered opinion held that the Virginia statutes were constitutional and concluded its opinion as follows: "Regulation of the marriage relation is, we think, distinctly one of the rights guaranteed to the States and safeguarded by that bastion of States' rights, somewhat battered perhaps but still a sturdy fortress in our fundamental law, the tenth section of the Bill of Rights, which declares 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"

In *Pace* v. *Alabama,* 106 U. S. 583, 1 S. Ct. 637, 27 L. ed. 207, a prosecution for a white person marrying a colored person was upheld. Pace, the negro, contended that

the Statute violated the Equal Protection of the 14th Amendment.

In *Jackson* v. *State,* 37 Ala. App. 519, 72 So. (2d) 114, as the party had been convicted under the miscegenation statute, the conviction was affirmed against the contentions that the right and privilege of marrying a white person violated the Due Process and Equal Protection clauses of the 14th Amendment the Supreme Court of the United States denied a writ of certiorari (1954).

In *Greenhow & Als* v. *James' Executor,* 80 Va. 636 (1885) the Court held that the children of a marriage contracted in the District of Columbia between a white person and a colored person could take under a will of a relative.

Such on marriage the Court said (80 Va. 61) ". . . Yet that it can have application to a marriage contract entered into in a foreign country in contravention of the public statutes of the country of their domicile which pronounces a marriage between them not only absolutely void but criminal. In the very nature of things every sovereign state must have the power to prescribe what incapacities for contracting marriage shall be established as the law among her own citizens, and it follows therefore that when the state has once pronounced an incapacity on the part of any of its citizens to enter into the marriage relationship with each other that such incapacity attaches itself to the person or parties and although it may not be enforceable during the absence of the parties, it at once revives with all its prohibitive power upon their return to place of domicile. . . ."

In *Toler* v. *Oakwood Smokeless Coal Corporation,* 173 Va. 425, 430 the Court speaking through Mr. Justice Spratley said:

"One state, however, cannot force its own marriage laws, or other laws, on any other state, and no state is bound by comity to give effect in its Courts to the marriage laws of another state, repugnant to its own laws and policy. Otherwise, a state would be deprived of the very essence of its sovereignty, the right of supremacy within its own borders. Such effect as may be given by a state to a law of another state is merely because of comity, or because justice and policy may demand recognition of such law. Such recognition is not a matter of obligation. Minor on conflict laws Sec. 4, 5, 6 and 126."

In 6 *Am Eng Enc. of Law* 2nd Ed P. 967 it is said "The right to marry is not such a privilege and immunity but a social institution of great importance subject to state regulation and a statute prohibiting intermarriage between white person and negroes is not a discrimination or unequal law contrary to the terms of the constitutional provisions."

It is next said that the sentence and the statute are unconstitutional as burdens on interstate commerce.

Marriage has nothing to do with interstate commerce. There is nothing more domestic than marriage; and this contentive is without merit.

It is next said such sentence has involved undue hardships upon the defendants by preventing them from together visiting their families from time to time as may be necessary to promote domestice tranquility.

This complaint relates to the terms of the suspension of this sentence, which is as follows:

"And the Court doth suspend said sentence for twenty-five years upon the provision that both accused

leave Caroline County and the State of Virginia at once and do not return together at the same time to said County and State for a period of twenty-five years."

The Court knew that if they come to Caroline County or to the State of Virginia together that they would be subject to prosecution for unlawful cohabitation and therefore permitted each are to separately visit his or her people, but not together. If it works a hardship on them not to visit their people together it is the law that they cannot cohabit together in Virginia. Each one of them can come to Caroline separately to visit his or her people as often as they please.

Section 53-272 of the Code of Virginia provides in part: "In any case wherein the Court is authorized to suspend the imposition or execution of sentence, such Court may fix the period of suspension for a reasonable time having due regard to the gravity of the offense, without regard to the maximum period for which the prisoner might have been sentenced."

The parties were guilty of a most serious crime. As said by the Court in *Kinney's Case* 30 Gratt 865: "It was a marriage prohibited and declared absolutely void. It was contrary to the declared public law, founded upon motives of public policy—a public policy affirmed for more than a Century, and one upon which social order, public morality and the best interests of both races depend. This unmistakable policy of the legislature founded, I think, on wisdom and the moral development of both races, has been shown by not only declaring marriages between whites and negroes absolutely void, but by prohibiting and punishing such unnatural alliances with severe penalties. The laws enacted

to further and uphold this declared policy would be futile and a dead letter if in fraud of these salutary enactments, both races might, by stepping across an imaginary line bid defiance to the law by immediately returning and insisting that the marriage celebrated in another state or county should be recognized as lawful, though denounced by the public law of the domicile as unlawful and absolutely void."

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

The awfulness of the offense is shown by Section 20-57 which declares: "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process."

Then Section 20-59 of the Code makes the contracting of a marriage between a white person and any colored person a felony.

Conviction of a felony is a serious matter. You lose your political rights; and only the government has the power to restore them (Constitution, Sec. 73). And as long as you live you will be known as a felon.

"The moving finger writes and moves on
and having writ
Nor all your piety nor all your wit
Can change one line of it."

—Leon M. Bazile, *Judge*

Order of the Circuit Court of Caroline County

This day came the defendants, by counsel, and moved the Court to vacate the judgment and set aside the sentence heretofore entered in this cause.

Upon consideration thereof, for reasons stated in an opinion heretofore filed, it is ADJUDGED and ORDERED that the said motion is hereby denied.

It is further ordered that the Clerk of this Court send an attested copy of this order to Bernard S. Cohen, Lainof, Cohen & Cohen, Attorneys at Law, 1513 King Street, Alexandria, Virginia, and J. Peyton Farmer, Commonwealth's Attorney of Caroline County.

Enter 22 January 1965.

LEON M. BAZILE, Judge.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 395

RICHARD PERRY LOVING, ET UX.,
Appellants,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

Appeal from the Supreme Court of Appeals of Virginia

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO AFFIRM

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STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO AFFIRM

PRELIMINARY STATEMENT

By letter of the Honorable John F. Davis, Clerk of the Supreme Court of the United States, dated October 20, 1966, the Attorney General of Virginia was requested to file a response to the appeal taken from an order of the Supreme Court of Appeals of Virginia in the instant case. In accordance with the request contained in the above-mentioned communication,* written by the Clerk at the direction of this Court, the within response is filed. The appellee, believing that the matters set forth herein will demonstrate the lack of substance in the question sought

to be presented by this appeal, files this statement in opposition to appellants' jurisdictional statement and includes her motion to affirm the judgment of the court below upon the ground that the question on which the decision of this cause depends is so unsubstantial as to obviate further argument.

PRIOR PROCEEDINGS

On January 6, 1959, appellants were convicted in the Circuit Court of Caroline County of leaving the State of Virginia and contracting a miscegenetic marriage in the District of Columbia with the intention of returning to—and actually returning and residing in—Virginia, in violation of Section 20-58 of the Virginia Code. Each appellant was sentenced to serve one year in jail; however these sentences were suspended for a period of twenty-five years upon the provision that appellants would leave Caroline County and the State of Virginia at once and not return together or at the same time to the county or state within such period. Upon payment of costs, appellants were released from custody and further recognizance.

On November 6, 1963, appellants filed in the Circuit Court of Caroline County a motion to vacate the judgment and set aside the sentence therein contained. Thereafter, the trial court filed an opinion indicating its intention to deny the motion, and an order effectuating such opinion was entered on January 22, 1965. Appellants subsequently appealed from this order to the Supreme Court of Appeals of Virginia, and the cause was heard on the merits. On March 7, 1966, the Supreme Court of Appeals of Virginia entered its opinion and order (1) affirming the order of the trial court with respect to the validity of the challenged statute (2) reversing that portion of the order of the trial

* Post, Appendix A.

court upholding the validity of the sentence imposed upon appellants and (3) remanding the cause for further proceedings not inconsistent with the views expressed by the Court on the latter question. See, *Loving et al.* v. *Commonwealth*, 206 Va. 924, 147 S.E.(2d) 78. The case is now before this Court upon an appeal filed by appellants on July 29, 1966.

STATEMENT OF FACTS

Richard Perry Loving, one of the appellants in this case, is a white, male citizen of the United States who was at all times relevant to this litigation a citizen and resident of the Commonwealth of Virginia. Mildred Jeter Loving, the additional appellant in this case, is a Negro, female citizen of the United States who was at all times relevant to this litigation a citizen and resident of the Commonwealth of Virginia. Richard Perry Loving is a "white person" within the definition of the Virginia Code, and Mildred Jeter Loving is a "colored person" within the definition of the Virginia Code.

On or about June 2, 1958, appellants went to the District of Columbia and were there married to each other pursuant to the laws of the District of Columbia. Subsequently, they returned to their residence in Caroline County, Virginia, and at the October Term, 1958, of the Circuit Court of Caroline County, an indictment was filed charging that on the 2nd day of June, 1958, "the said Richard Perry Loving, being a white person and the said Mildred Delores Jeter being a colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caro-

line, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth."

On January 6, 1959, appellants entered pleas of guilty to the charge specified in the indictment, whereupon the court fixed the punishment of each appellant at one year in jail. Thereafter, the court suspended such sentence for a period of twenty-five years upon the provision that both appellants leave Caroline County and the State of Virginia at once and not return together or at the same time to said county and state during the specified period. Upon payment of costs, appellants were released from custody and further recognizance.

THE STATUTES INVOLVED

The statutes under attack in the instant proceedings are Sections 20-58 and 20-59 of the Code of Virginia (1950), which statutes respectively prescribe:

> "§ 20-58—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.
>
> "§ 20-59—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

QUESTION PRESENTED

Are Sections 20-58 and 20-59 of the Virginia Code violative of the Fourteenth Amendment to the Constitution of the United States?

ARGUMENT

Sections 20-58 and 20-59 Of The Virginia Code Are Not Violative Of The Fourteenth Amendment To The Constitution Of The United States.

A.

The Precise Statutes Under Attack In This Case

The record discloses that the indictment under which appellants were convicted in the Circuit Court of Caroline County charged that, on June 2, 1958, "Richard Perry Loving being a White person and the said Mildred Dolores Jeter being a Colored person, did unlawfully and feloniously go out of the State of Virginia for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth."

The substantial identity between the language of the indictment quoted above and that contained in Section 20-58 of the Virginia Code (*ante*, p. 4) establishes that appellants were indicted for violation of Section 20-58 of the Virginia Code and that sentence was imposed in accordance with the provisions of Section 20-59 of the Virginia Code as specified in the statute under which the indictment was laid. In this connection, the Supreme Court of Appeals of Virginia pointed out (206 Va. at 925, 147 S.E. (2d) at 79):

> "There is no dispute that Richard Perry Loving is a white person and that Mildred Jeter Loving is a colored person within the meaning of Code, § 20-58. Nor is there any dispute that the actions of the defendants, as set forth in the indictment, violated the provisions of Code, § 20-58."

In light of these circumstances, it is manifest that the instant appellants possess the requisite standing to challenge only the provisions of Sections 20-58 and 20-59 of the Virginia Code and that the Supreme Court of Appeals of Virginia passed upon the validity of these statutes only. So far as the instant litigation is concerned, no official of the Commonwealth of Virginia has undertaken to apply or impose any provision of the remaining statutes comprising Chapter 4 of Title 20 of the Virginia Code to the present appellants. Specifically in this connection, no attempt has been made to bring the marital status of the appellants within the ambit of Section 20-54 of the Virginia Code or its collateral statutes (Sections 20-50, 20-51, 20-52, 20-53 and 20-55) which comprise Chapter 371 of the Acts of Assembly (1924) entitled "An Act to preserve racial integrity." See Appendix B, *post*.

B.

History Of The Fourteenth Amendment.

As pointed out by the Supreme Court of Appeals of Virginia (206 Va. at 926, 147 S.E. (2d) at 80):

> "The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the defendants argue, deny them due process of law and equal protection of the law."

Counsel for appellee submit that the constitutional issue sought to be tendered by the instant appeal has been so thoroughly settled against the position of appellants, and settled by such an exhaustive array of judicial authority, as

to render the question so unsubstantial as to obviate further consideration by this Court.

Initially in this connection, an analysis of the legislative history of the Fourteenth Amendment conclusively establishes the clear understanding—both of the legislators who framed and adopted the Amendment and the legislatures which ratified it—that the Fourteenth Amendment had no application whatever to the anti-miscegenation statutes of the various States and did not interfere in any way with the power of the States to adopt such statutes. The precise question was specifically considered by the framers of the Amendment, and a clear intent to exclude such statutes from the scope of the Fourteenth Amendment was repeatedly made manifest.

The propriety of undertaking a study of the legislative history of the Fourteenth Amendment so that it may be read to effectuate the intent and purposes of the Framers is abundantly supported by numerous decisions of this Court. See, *Bell* v. *Maryland,* 378 U.S. 226, 288-289; *Ullman* v. *United States,* 350 U. S. 422, 428; *Adamson* v. *California,* 332 U. S. 46, 72. Moreover, as this Court has frequently pointed out, the Fourteenth Amendment had its origins in the Civil Rights Act of 1866 and a companion measure, the Freedman's Bureau Bill, and was adopted to provide a firm constitutional basis for the Civil Rights Act of 1866. *Bell* v. *Maryland, supra,* at 292-293, *Adamson* v. *California, supra,* at 68, 107-108. A review of the debates on the bill which ultimately became the Civil Rights Act of 1866, discloses beyond cavil the intention of the Framers to exclude State anti-miscegenation laws from the terms of that enactment. Typical of the observations of the Framers upon the question here under consideration are those of Senator Lyman Trumbull of Illinois and the Honorable C. E. Phelps of Maryland. Senator Trumbull, who had introduced the Civil Rights Bill and was its manager, made

it clear that there was no intent to nullify the anti-miscegenation statutes or constitutional requirements of the various States or to restrict future legislation as to miscegenation. On this point he said:[1]

> ". . . But, says the Senator from Indiana, we have laws in Indiana prohibiting black people from marrying whites, and you are going to disregard these laws? Are our laws enacted for the purpose of preventing amalgamation to be disregarded, and is a man to be punished because he undertakes to enforce them? I beg the Senator from Indiana to read the bill. One of its objects is to secure the same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vice versa?* I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races. *This bill does not interfere with it.* If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both. Make the penalty the same on all classes of people for the same offense, and then no one can complain." (Italics supplied.)

Speaking on the same matter at a later date, Senator Trumbull repeated:[2]

> ". . . The Senator says the laws of Kentucky forbid a white man or woman marrying a negro, and that these laws of Kentucky are to exist forever; that severe

[1] Cong. Globe, 39th Cong., 1st Sess. 322.
[2] Cong. Globe, 39th Cong., 1st Sess., 420.

> penalties are imposed in the State of Kentucky against amalgamation between the white and black races. . . . *But, sir, it is a misrepresentation of this bill to say that it interferes with those laws.* I answered that argument the other day when it was presented by the Senator from Indiana. The bill provides for dealing out the same punishment to people of every color and every race; and if the law of Kentucky forbids the white man to marry the black woman I presume it equally forbids the black woman to marry the white man, and the punishment is alike upon each. All this bill provides for is that there shall be no discriminations in punishments on account of color; and unless the Senator from Kentucky wants to punish the negro more severely for marrying a white person than a white for marrying a negro, the bill will not interfere with his law." (Italics supplied.)

To the same effect were the following observations of the Honorable C. E. Phelps of Maryland:[8]

> "—Efforts have been made, and very ingeniously, by gentlemen opposed to the bill,—by arguing from the language used in the seventh and eighth sections an inference of a design *to control state laws in respect to the marriage relation. Such a construction is not warranted by the terms employed.—"* (Italics supplied.)

In light of the above-quoted observations, it is clear that it was the opinion of those who spoke on behalf of the Civil Rights Act of 1866 that it had no application to State anti-miscegenation statutes. Equally clear is it that the Fourteenth Amendment had no other or broader scope. See, Pittman: "The Fourteenth Amendment: Its Intended Effect On Anti-miscegenation Laws," *The North Carolina Law Review,* Vol. 43 No. 1, December, 1964.

[8] App. to the Cong. Globe, 39 Cong., 1st Sess., p. 75.

If the intent of the State Legislatures which ratified the Fourteenth Amendment is deemed controlling, then surely the question of whether or not the Fourteenth Amendment forbids enactment of anti-miscegenation statutes by the States must be decided contrary to the contention of appellants, for those States which ratified the Fourteenth Amendment clearly signified their intent by continuation of their anti-miscegenation laws contemporaneously with the ratification of the Fourteenth Amendment. In this connection, a comparison of the States which retained their anti-miscegenation laws as late as 1951 with the list of States which ratified the Fourteenth Amendment reveals that a majority of such States maintained their anti-miscegenation laws in force after ratification of the Fourteenth Amendment. See Murray: States' Laws On Race And Color (1951); U.S.C.A. Const. Amend. XIV. Pertinent in this regard is the observation of Mr. Justice Frankfurter in *Adamson* v. *California, supra,* at 64, with respect to an analogous situation involving interpretation of the Fourteenth Amendment:

> "Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It would hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system."

In *In re Hobbs,* 1 Woods 537 (5 Cir., 1871) a Federal court considering a petition for writ of habeas corpus submitted by one arrested for violation of a State anti-miscegenation law held that the Fourteenth Amendment did not invalidate the provisions of the statute in question. More-

over, in *Ex parte Kinney,* 3 Hughes 1 (4 Cir., 1879), a Federal court, construing Virginia's anti-miscegenation statute, held that such statute was not violative of the Fourteenth Amendment.

In addition, as will be pointed out later in this brief, numerous decisions of the highest judicial tribunals of various States have sustained anti-miscegenation statutes against attack under the Fourteenth Amendment. Of such decisions, those contemporaneous with the passage of the Fourteenth Amendment are *Scott* v. *Georgia,* 39 Ga. 323 (1869) and *State* v. *Gibson,* 36 Indiana 389 (1871).

In light of the foregoing, it is clear that—contemporaneously with the adoption of the Fourteenth Amendment—the Congress of the United States, the legislatures of various States ratifying the Fourteenth Amendment, Federal courts and State courts clearly indicated that anti-miscegenation statutes of the various States are not violative of the Fourteenth Amendment.

C.

Judicial Decisions.

Thoroughly consistent with the legislative history of the Fourteenth Amendment is the virtually uninterrupted line of judicial decisions, both Federal and State, in which the constitutional validity of State anti-miscegenation statutes has been sustained against assault under the Fourteenth Amendment. So far as the case at bar is concerned, the very statute currently under attack has been held not violative of the Fourteenth Amendment by a Federal Court of the Fourth Circuit. *Ex parte Kinney,* 3 Hughes 9, 14 Fed. Cases 607. In that case, the United States Circuit Court (now District Court) for the Eastern District of Virginia denied a writ of habeas corpus sought by a Virginia citizen

who had been convicted for violation of what is now Section 20-58 of the Virginia Code. The writ was requested upon the ground, *inter alia*, that the challenged enactment violated the Fourteenth Amendment. Rejecting this contention the Court declared (14 Fed. Cases at 606, 607 608):

> "Congress has made no law relating to marriage. It has not, simply because it has no constitutional power to make laws affecting the domestic relations and regulating the social intercourse of the citizens of a state. *If it were to make such a law for the states, that law would be unconstitutional, and the federal courts would not hesitate to declare it so.*
>
> * * *
>
> "It was competent for the state of Virginia, *so far as there is anything in the constitution and laws of the United States to prevent,* to enact the law just quoted under which the petitioner was convicted. . . .
>
> * * *
>
> "On the whole, I am of the opinion that the law of Virginia, under which this petitioner is detained in prison by the state, *does not violate the constitution or any law of the United States. . . .*" (Italics supplied.)

The most recent decision of a Federal Court on the question of the constitutionality of anti-miscegenation statutes appears to be *Stevens* v. *United States,* 10 Cir., 146 F. (2d) 120. In that case, the Court of Appeals for the Tenth Circuit stated (146 F. (2d) at 123):

> "Section 12, supra, making unlawful marriages between persons of African descent and persons of other races or descents is challenged on the ground that it violates the Fourteenth Amendment. Marriage is a consentient covenant. It is a contract in the sense

that it is entered into by agreement of the parties. But it is more than a civil contract between them, subject to their will and pleasure in respect of effects continuance, or dissolution. *It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state.* A state has power to prescribe by law the age at which persons may enter into marriage, the procedure essential to constitute a valid marriage, the duties and obligations which it creates, and its effects upon the property rights of both parties. *Maynard* v. *Hill,* 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654. *And within the range of permissible adoption of policies deemed to be promotive of the welfare of society as well as the individual members thereof, a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment."* (Italics supplied.)

To the same effect are the decisions in a host of cases arising in various jurisdictions, both State and Federal, in which the constitutional validity of State anti-miscegenation statutes has received judicial approbation. See, *Rogers* v. *State,* 37 Ala. App. 638, 73 So. (2d) 389; *State* v. *Pass,* 59 Ariz. 16, 121 P. (2d) 882 (1942); *Dodson* v. *State,* 61 Ark. 57, 31, S.W. 977 (1895); *State* v. *Gibson,* 36 Ind. 389 (1871); *Scott* v. *Georgia,* 39 Ga. 321 (1869); *State* v. *Kennedy,* 76 N.C. 251 (1869); *State* v. *Jackson,* 80 Mo. 175 (1883); *In Re Paquet's Estate,* 101 Ore. 393; 200 P. 911 (1921); *Lonas* v. *State,* 3 Heisell (50 Tenn.) 287 (1871); *Frasher* v. *State,* 3 Tex. App. 263 (1877); *Re Shun T. Takahashi's Estate* 113 Mont. 490, 129 P. (2d) 217 (1942); *In re Hobbs,* 1 Woods 537, 12 Fed. Cases 262 (5th Cir. 1871); *Ex Parte Francois,* 3 Woods 367, 9 Fed. Cases

699 (5th Cir. 1879).

The most recent decisions of State courts upon the question here under consideration are *State* v. *Brown,* 236 La. 562, 108 So. (2d) 233; *Naim* v. *Naim,* 197 Va. 80, 87 S. E. (2d) 749, *remanded* 350 U. S. 891, *aff'd.* 197 Va. 734, 90 S. E. (2d) 849, *app. dism.* 350 U. S. 985; and *Jackson* v. *State,* 37 Ala. App. 519, 72 So. (2d) 114, 260 Ala. 698, 72 So. (2d) 116, *cert. den.* 348 U. S. 888. With respect to the last mentioned of these recent cases, the Supreme Court of Appeals of Virginia pointed out in its opinion in the case at bar (206 Va. at 927, 147 S. E. (2d) at 81):

> "The United States Supreme Court itself has indicated that the *Brown* decision [*Brown* v. *Board of Education,* 347 U. S. 483] does not have the effect upon miscegenation statutes which the defendants claim for it. The *Brown* decision was announced on May 17, 1954. On November 22, 1954, just six months later, the United States Supreme Court denied certiorari in a case in which Alabama's statute forbidding intermarriage between white and colored persons had been upheld against the claim that the statute denied the Negro appellant 'her constitutional right and privilege of intermarrying with a white male person,' and that it violated the Privileges and Immunities, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. *Jackson* v. *State,* 37 Ala. App. 519, 72 So. 2d 114, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U.S. 888, 99 L. ed. 698, 75 S. St. 210."

So uniform has been the course of decisions from the earliest cases decided contemporaneously with the adoption of the Fourteenth Amendment to the most recent decisions of Federal and State courts in the *Stevens, Brown, Naim* and *Jackson* cases, *supra,* that the law applicable to the con-

stitutional issue presented in the case at bar is deemed to be no longer open to question. In this connection, the governing rule is well summarized in 36 Am. Jur. 452, Miscegenation: Section 3, in the following language:

> In accordance with the power of every country to make laws regulating the marriage of its own subjects to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying, *it is considered as well settled that although miscegenation statutes have been persistently attacked on the ground that they are violative of the United States Constitution, they nevertheless constitute a proper exercise of the power of each state to control its own citizens.*" (Italics supplied.)

The above canvassed array of judicial decisions covering a period of almost one hundred years led the Supreme Court of Appeals of Virginia to observe in the instant case (206 Va. at 926, 147 S. E. (2d) at 80):

> "The problem here presented is not new to this court nor to other courts, both state and federal, throughout the country. The question was most recently before this court in 1955, in *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749, remanded 350 U.S. 891, 100 L ed. 784, 76 S. Ct. 151, aff'd. 197 Va. 734, 90 S.E. 2d 849, app. dism. 350 U.S. 985, 100 L. ed. 852, 76 S. Ct. 472.
>
> "In the *Naim* case, the Virginia statutes relating to miscegenatic marriages were fully investigated and their constitutionality was upheld. There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The one exception, it was noted, was the California Supreme

Court which declared the California miscegenation statutes unconstitutional in *Perez* v. *Sharp*, 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. *Perez* v. *Lippold*).

"The *Naim* opinion, written for the court by Mr. Justice Buchanan, contains an exhaustive survey and citation of authorities, both case and text from both state and federal sources, upon the subject of miscegenation statutes. It is not necessary to repeat all those citations in this opinion because the defendants concede that the *Naim* case, if given effect here, is controlling of the question before us."

In light of the foregoing, counsel for appellee submit it is manifest that Sections 20-58 and 20-59 of the Virginia Code are not violative of the Fourteenth Amendment to the Constitution of the United States.

D.

Wisdom of Statutory Policy.

The historical background of the Fourteenth Amendment and the judicial exposition of the Fourteenth Amendment canvassed in Section B and Section C, respectively, of this statement on behalf of the appellee conclusively demonstrates that—*as a matter of law*—the Fourteenth Amendment has no applicability to the anti-miscegenation statutes of the various States and does not circumscribe to any degree the power of the States to prevent interracial marriages. Under such circumstances, counsel for the appellee assert than any judicial inquiry into the wisdom, propriety or desirability of preventing interracial alliances is utterly forbidden, and any evidence of a scientific nature tending to support or undermine the legislative determination of the propriety or desirability of such a policy would be completely irrelevant and incompetent. The validity of this posi-

tion is abundantly supported by authority. See, 11 Am. Jur: 804, 808-813, Constitutional Law: Section 138; 16 C.J.S. 775-790, Constitutional Law: Section 154.

In this connection, we note that—aside from general rhetoric concerning the alleged arbitrary, capricious and unreasonable nature of the challenged enactment—appellants have not included in their Jurisdictional Statement any reference to scientific treatises or texts tending to support this aspect of their position. However, such references were made in their brief and argument before the Supreme Court of Appeals of Virginia, as the following observation of that Court reveals (206 Va. at 929, 147 S. E. (2d) at 82):

> "The defendants also refer as to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the *Naim* decision is erroneous and that such marriages should not be forbidden by law.
>
> A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term. Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate."

In the Supreme Court of Appeals of Virginia, counsel for appellee successfully asserted the impropriety of any judicial inquiry into the wisdom of the anti-miscegenation policy reflected in the statutes under attack, or any analysis of scientific treatises or texts. We advised that Court (and now respectfully advise this Court) that if it should undertake such an inquiry, it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability

of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view. Here, we only wish to make it clear that our emphasis upon this point was not occasioned by any dearth of scientific materials supportive of the wisdom or desirability of the Virginia statutes. A host of such authorities was carefully catalogued in the twelve page dissenting opinion in *Perez* v. *Sharp,* 32 Cal. (2d) 711, 198 P. (2d) 17 (*sub. nom.—Perez* v. *Lippold*). Moreover, it appears that there has been no diminution in the flood of scientific materials on this subject. See, Gates: *Heredity in Man* (1929); Gates: *Genetics, Taxonomy, and the Races of Man,* 68 *Journal of the Elisha Mitchell Scientific Society* No. 2, (1952); Keith: *A New Theory of Human Evolution* (1949); Darlington: *The Facts of Life* (1956); Mayr: *Animal Species and Evolution* (1963); Coon: *The Origin of Races* (1962). So far as counsel for the Commonwealth have been able to ascertain the most recent scientific treatise upon the propriety or desirability of interracial marriages from the psychological and sociological point of view is that of Dr. Albert I. Gordon, entitled *Intermarriage—Interfaith Interracial, Interethnic* published in 1964. This work has been characterized as the "definitive book on intermarriage" by Dr. Gordon W. Allport, Professor of Psychology at Harvard University, and as "the most careful, up-to-date, methodologically sound study of intermarriage in North America that exists . . ." by Dr. Herbert Gezork, President of the Andover Newton Theological School.

Typical of the findings, observations and conclusions set forth in this most recent treatise upon the subject of interracial marriages are the following:

[PP. 334-335]

"Inasmuch as we have already noted the higher rate of divorce among the intermarried, is it not proper to

ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?' If there is any possibility that this is likely to occur—and the evidence certainly points in that direction—it would seem that our obligation to children should tend to reduce the number of such marriages.

* * *

[P. 357]

"The argument that persons who oppose intermarriage—religious or racial—are per se 'prejudiced,' may be true of some persons; true, in degree, about others; and yet be completely untrue about still others. The desire to perpetuate one's own religion or to prevent its assimilation is understandable and reasonable. If it were necessary to 'prove' that each of us is entitled to life only because we possess some demonstrably unique or special talent or gift of mind or body, our society would be decimated in short order. Just as no individual needs to explain his desire to liv so it would seem to me that neither races of man nor religious or ethnic groups need offer apologies for their desire to perpetuate themselves. I believe that the tendency to classify all persons who oppose intermarriage as 'prejudiced' is, in itself, a prejudice.

* * *

[PP. 367-368]

"It is my conviction that intermarriage is definitely inadvisable. It places a greater stress and strain upon marriage than is ordinarily true when persons of similar religious views are married. We need not guess about this. In every case of interfaith marriage that we have examined, the facts about the greater strains involved have come to the fore. The fact that divorce and separation rates are higher in these interfaith marriages serves also to support this view.

* * *

"Intermarriages are wrong too because they are often based on the mistaken premise that, in this way, universalism and human brotherhood is assured. Not

only has this theory not been proved—it has rather, been exploded. Two nothings are still nothing. A plus and a minus simply cancel each other out. Nothing of any significance is gained by such a marriage. If all humans on a given day gave up all their differences (an utterly fantastic idea) we might have half a chance. But in the world as we know it such an idea is impracticable if not absurd.

* * *

"As I view it, intermarriage constitutes a threat to society and is not necessarily a promise of a brighter day to come.

* * *

[P. 370]

"Intermarriage, as I view it, holds no promise for a bright and happy future for individuals or for mankind. The evidence, as I view it, is clear on this point. The facts speak for themselves.

* * *

[PP. 372-373]

"The statistical evidence incorporated in this study makes it clear that the 'odds' do not favor intermarriages, in that almost two to four times as many intermarriages as intramarriages end in divorce, separation or annulment. This is a highly significant fact. It is objective and utterly free from emotion-inducing factors. It ought, therefore, to be considered and weighed most carefully.

* * *

"I lay no claim to omniscience or infallibility; hence, I can not claim that the views expressed here are correct in every detail and meet every situation. Both years of study of intermarriage as a concern of the social scientist, and years of intimate personal contact with people who have come to me asking for counsel and assistance with marital problems, make me feel that I may be of assistance to others who contemplate intermarriage. Perhaps our society will change so radically in its views and attitudes within the next

> decade that my views, too, will change. However, I doubt that such a condition is likely to occur. So for the present these views are, I think, worthy of careful consideration and study."

These materials, and others which could be cited by counsel for the appellants, clearly demonstrate the conflicting views of eminent scientific authorities upon the wisdom or desirability of interracial marriages and the prevention of such marriages. In such a situation, it is the exclusive province of the legislature of each State to make the determination for its citizens as to the desirability of a policy of permitting or preventing such alliances—a province which the judiciary may not, under well settled constitutional doctrine, invade. Counsel for the appellee submit, therefore, that such scientific evidence is irrelevant to any proper area of judicial inquiry in the instant case, and that the determination of the General Assembly of Virginia upon this matter should be left undisturbed by this Court.

CONCLUSION

Upon a consideration of the whole matter, the Supreme Court of Appeals of Virginia declared (206 Va. at 929, 147 S. E. (2d) at 82):

> "The defendants direct our attention to numerous federal decisions in the civil rights field in support of their claims that the *Naim* case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law.
>
> "We have given consideration to these decisions, but it must be pointed out that none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized—that there is an overriding state interest in the institution of marriage.
>
> * * *

> "Our one and only function in this instance is to determine whether, for sound judicial considerations, the *Naim* case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case. According that decision all of the weight to which it is entitled under the doctrine of *stare decisis*, we hold it to be binding upon us here and rule that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States."

It is difficult to comprehend how any other conclusion could have been reached. "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature." *Maynard* v. *Hill*, 125 U.S. 190, 205. "Upon it society may be said to be built, and out of its fruit spring social relations and social obligations and duties, with which government is necessarily required to deal." *Reynolds* v. *U.S.*, 98 U.S. 145, 165. Moreover, "under the Constitution the regulation and control of marital and family relationships are reserved to the States . . . [and] . . . the regulation of the incidents of the marital relation involves the exercise by the States of powers of the most vital importance." *Sherrer* v. *Sherrer*, 334 U.S. 343, 354.

The Virginia statutes here under attack reflects a policy which has obtained in this Commonwealth for over two centuries and which still obtains in almost half of the fifty States of the Union. They have stood—compatably with the Fourteenth Amendment, though expressly attacked there-

under—since that Amendment was adopted. Under such circumstances, it is clear that the challenged enactments infringe no constitutional right of the appellee. Counsel for appellee submit therefore that the question upon which the decision of this cause depends is so unsubstantial as to obviate further argument.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General of Virginia

KENNETH C. PATTY
Assistant Attorney General

R. D. MCILWAINE, III
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for appellee in the above-captioned matter, hereby certify that copies of this Statement of Appellee Opposing Jurisdiction and Motion to Affirm have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first-class postage prepaid, this 17th day of November, 1966, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Bernard S. Cohen, Esq. and Philip J. Hirschkop, Esq., Lainof, Cohen & Cohen, Esq., 1513 King Street, Alexandria, Virginia; Melvin L. Wulf, Esq., 156 Fifth Avenue, New York, New York, and David Carliner, Esq., 1424 16th Street, N.W., Suite 501, Washington, D. C., counsel for appellants.

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Assistant Attorney General

APPENDIX A

Office of the Clerk
Supreme Court of the United States
Washington, D. C., 20543

October 20, 1966

The Honorable Robert Y. Button
Attorney General of Virginia
Richmond, Virginia

RE: LOVING, ET UX. v. VIRGINIA
No. 395, October Term, 1966

Dear Sir:

An appeal from the order of the Supreme Court of Appeals of Virginia (No. 6163), dated March 7, 1966, was filed in this Court on July 29, 1966, in the above-entitled case.

The Court has directed this office to request that you file a response. Such a response usually takes the form of a motion to dismiss or affirm (Rule 16). Forty printed copies of such a motion, together with proof of service thereof, should reach this office on or before November 19, 1966.

Very truly yours,

JOHN F. DAVIS, Clerk
By MICHAEL RODAK, JR.
Deputy Clerk

cc: BERNARD S. COHEN, ESQ.
1513 King Street
Alexandria, Virginia

APPENDIX B

§ 20-50.—The State Registrar of Vital Statistics may prepare a form whereon the racial composition of any individual, as Caucasion, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains and if there be any mixture, then, the racial composition of the parents and other ancestors, insofar as ascertainable, so as to show in what generation such mixture occurred, may be certified by such individual, which form shall be known as a registration certificate. The State Registrar of Vital Statistics may supply to each local registrar a sufficient number of such forms for the purpose of this chapter; each local registrar may, personally or by deputy, as soon as possible after receiving the forms, have made thereon in duplicate a certificate of the racial composition, as aforesaid, of each person resident in his district, who so desires, born before June fourteenth, nineteen hundred and twelve, which certificate shall be made over the signature of such person, or in the case of children under fourteen years of age, over the signature of a parent, guardian, or other person standing in loco parentis. One of such certificates for each person thus registering in every district shall be forwarded to the State Registrar of Vital Statistics for his files; the other shall be kept on file by the local registrar.

Every local registrar may, as soon as practicable, have such registration certificate made by or for each person in his district who so desires, born before June fourteenth, nineteen hundred and twelve, for whom he has not on file a registration certificate, or a birth certificate. (1924, p. 534; Michie Code 1942, § 5099a.)

§ 20-51.—It shall be a felony for any person wilfully or knowingly to make a registration certificate false as to color

or race. The wilful making of a false registration or birth certificate shall be punished by confinement in the penitentiary for one year. (1924, p. 534; Michie Code 1942, § 5099a.)

§ 20-52.—For each registration certificate properly made and returned to the State Registrar of Vital Statistics, the local registrar returning the same shall be entitled to a fee of twenty-five cents, to be paid by the registrant. Application for registration and for transcript may be made direct to the State Registrar, who may retain the fee for expenses of his office. (1924, p. 534; Michie Code 1942, § 5099a.)

§ 20-53.—No marriage license shall be granted until the clerk or deputy clerk has reasonable assurance that the statements as to color of both man and woman are correct.

If there is reasonable cause to disbelieve that applicants are of pure white race, when that fact is stated, the clerk or deputy clerk shall withhold the granting of the license until satisfactory proof is produced that both applicants are "white persons" as provided for in this chapter.

The clerk or deputy clerk shall use the same care to assure himself that both applicants are colored, when that fact is claimed. (1924, p. 534. Michie Code 1942, § 5099a.)

§ 20-54.—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed

and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter. (1924, p. 535; Michie Code 1942, § 5099a.)

§ 20-55.—For carrying out the purposes of this chapter and to provide the necessary clerical assistance, postage and other expenses of the State Registrar of Vital Statistics, twenty per cent of the fees received by local registrars under this chapter shall be paid to the State Bureau of Vital Statistics, which may be expended by the Bureau for the purposes of this chapter. (1924, p. 535; Michie Code 1942, § 5099a.)

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Supreme Court of the United States

October Term, 1966

No. 395

RICHARD PERRY LOVING, et ux.,
Appellants,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

Appeal From the Supreme Court of Virginia

Brief of the State of North Carolina As Amicus Curiae

The State of North Carolina files this brief as amicus curiae under the sponsorship of T. W. Bruton, Attorney General of North Carolina, pursuant to Rule 42(4), Rules of the Supreme Court.

INTEREST OF THE STATE OF NORTH CAROLINA

As will be hereafter shown North Carolina has the same legal status as the State of Virginia as to intermarriage between the white and colored races and as to the intermarriage between a white person and a colored person who go out of the State and are married and afterward return to and reside in the State, cohabiting as man and wife.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article XIV, Section 8, of the Constitution of North Carolina, provides as follows:

"Sec. 8. *Intermarriage of whites and Negroes prohibited.* —All marriages between a white person and a Negro, or between a white person and a person of Negro descent to the third generation, inclusive, are hereby forever prohibited." (Convention 1875)

Section 51-3 of the General Statutes of North Carolina (Replacement 1966) provides as follows:

"Sec. 51-3. *Want of capacity; void and voidable marriages.*—All marriages between a white person and a Negro or between a white person and a person of Negro descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a Negro, or between a Cherokee Indian of Robeson County and a person of Negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under sixteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void * * *".

Section 14-181 of the General Statutes of North Carolina (Volume 1B) provides as follows:

"Sec. 14-181. *Miscegenation.*—All marriages between a white person and a Negro, or between a white person and a person of Negro descent to the third generation inclusive, are forever prohibited, and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or State's Prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court."

Section 14-182 of the General Statutes provides as follows:

"Sec. 14-182. *Issuing license for marriage between white*

person and Negro; performing marriage ceremony.— If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor."

OPINION BELOW

The appeal in this case arises upon the validity of the Virginia Statute, which was held to be valid by the highest appellate court in Virginia (LOVING, et al. v. COMMONWEALTH, 206 Va. 924, 147 S. E. 2d 78).

QUESTION PRESENTED

ARE THE VIRGINIA STATUTES (SECS. 20-58 and 20-59) CONSTITUTIONAL AND VALID WHEN MEASURED BY THE STANDARDS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

ARGUMENT

The Facts in the Virginia Case

We do not enter into the facts of the case in any detail for they are stated in the Virginia brief. Richard Perry Loving is a white person and Mildred Jeter Loving is a colored person. They left the State of Virginia for the purpose of being married, the ceremony having been performed in the District of Columbia, and they had the intention of returning to Virginia. They did return to Virginia where they lived together and cohabited as man and wife. The facts are all set forth in detail in the Opinion of the Supreme Court of Appeals of Virginia.

The North Carolina Statutes and Decisions

A mere reference to the facts in the Virginia case will

show that had the same event occurred in the State of North Carolina the result would have been the same so far as our courts are concerned (STATE v. KENNEDY, 76 N. C. 251).

Neither the Virginia Statutes nor the North Carolina Statutes Violate any Provisions of the Fourteenth Amendment.

It is the contention of the State of North Carolina that the proper rule of constitutional construction on this question is as follows (16 Am. Jur. 2d, p. 239, sec. 64):

"The fundamental principle of constitutional construction is that effect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions. A constitutional clause must be construed reasonably to carry out the intentions of the framers, and should not be construed so as to defeat the obvious intent if another construction equally in accordance with the words and sense may be adopted which will enforce and carry out the intent. The intent must be gathered from both the letter and the spirit of the document, the rule being that a written construction is to be interpreted in the same spirit in which it was produced. The court should put itself as nearly as possible in the position of the men who framed the instrument.

"Wherever the purpose of the framers of a constitution is clearly expressed, it will be followed by the courts. If the terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption, because in construing a constitutional provision, its general scope and object should be considered.

"Notwithstanding that the intent of the framers is to be ascertained and effectuated wherever possible, the fact that the framers of the Federal Constitution could not possibly have been familiar with a certain subject

matter is of little significance in determining whether a provision of the Constitution applies thereto. *Contrariwise judicial notification of legislation cannot be justified by attributing to the framers of the Constitution views for which there is no historic warrant.*" (Emphasis ours)

We cannot improve upon the able argument set forth in the Virginia brief as to the "original understanding" on this question when the Fourteenth Amendment was adopted. The debates in Congress clearly show that it was not the understanding that the Fourteenth Amendment would invalidate the Anti-Miscegenation Laws of the States since this point was clearly brought up in the debates and considered by those passing upon the proposed amendment. This is clearly shown by the statements of Senator Trumbull from Illinois, who introduced the then Civil Rights Bill and was its manager, and Phelps of Maryland. It is noteworthy that Senator Trumbull spoke to an objection made by the Senator from Indiana, which shows that Indiana, a northern state, at that time had laws "prohibiting black people from marrying whites." Unless, therefore, the Fourteenth Amendment is construed as a grand commission which constitutes the federal courts as a species of judicial privateers to sink every state ship in sight if they do not like the cut of its sails, then the historic position asserted by Virginia is clearly sound. It is also sound that when the states who ratified the Fourteenth Amendment, having at that time Anti-Miscegenation Statutes in their codes, clearly did not think that they were thereby invalidating such statutes.

This Court has in many cases referred to the historical setting as well as the debates in Congress in passing upon such questions and we see no need for us to marshal the legal authorities on this point.

The Judicial Authorities Available Support the Virginia Position.

We do not go into all of the judicial constructions on this point for this has been well done in the Virginia brief and it is sufficient for us to say that we adopt the arguments and

cases there cited. Unless this is a mere policy matter and judicial precedents are not controlling then we assert that the great weight of judicial authority supports the constitutional validity of a state's anti-miscegenation statute.

The So-Called Scientific Argument

We do not enter into the scientific realm on this question. There is no equalitarianism in the field of biology, anthropology and geneticism. There is no certitude or concrete exactness in this field. These so-called sciences have not yet reached the position or status of the exact sciences one hundred and fifty years ago. Usually the major emphasis in such books or discussions centers around the alleged sex jealousies of the white man and the alleged preference of the Negro man for white women. You can select books and treatises both pro and con on this question; one thing is sure and that is neither cranial measurements, intelligence quotients nor statistical averages will ever settle the question. This field is like expert witnesses in that you pay your money and take your choice. If a state feels like the life of its people is better protected by a policy of racial integrity as to both races, or for any other race for that matter, then it has the right to legislate in such field. The fact that the state's conclusions may differ from the conclusions of other groups should not affect the matter unless minority groups are entitled to preferential constitutional privileges contrary to the judgment of the majority.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 395

RICHARD PERRY LOVING AND
MILDRED DELORES JETER LOVING, *Appellants*

v.

COMMONWEALTH OF VIRGINIA, *Appellee*

On Appeal from the Supreme Court
of Appeals of Virginia

BRIEF AMICUS CURIAE[1] URGING REVERSAL ON BEHALF OF—

JOHN J. RUSSELL, Bishop of Richmond;
LAWRENCE CARDINAL SHEHAN, Archbishop of Baltimore;
PAUL A. HALLINAN, Archbishop of Atlanta;
PHILIP M. HANNAN, Archbishop of New Orleans;
ROBERT E. LUCEY, Archbishop of San Antonio;
JOSEPH B. BRUNINI, Apostolic Administrator of Natchez-Jackson;
LAWRENCE M. DEFALCO, Bishop of Amarillo;
JOSEPH A. DIRICK, Apostolic Administrator of Nashville;
THOMAS K. GORMAN, Bishop of Dallas-Ft. Worth;
JOSEPH H. HODGES, Bishop of Wheeling;
JOHN L. MORKOVSKY, Apostolic Administrator of Galveston-Houston;
VICTOR J. REED, Bishop of Oklahoma City and Tulsa;
L. J. REICHER, Bishop of Austin;
THOMAS TSCHOEPE, Bishop of San Angelo;
ERNEST L. UNTERKOEFLER, Bishop of Charleston;
VINCENT S. WATERS, Bishop of Raleigh;
THE NATIONAL CATHOLIC CONFERENCE FOR INTERRACIAL JUSTICE; and
THE NATIONAL CATHOLIC SOCIAL ACTION CONFERENCE

[1] Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of Appellants' counsel and of the Attorney General of the Commonwealth of Virginia to the filing of this Brief Amicus Curiae.

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of The National Catholic Conference for Interracial Justice, The National Catholic Social Action Conference, and the following Roman Catholic bishops:

John J. Russell, Bishop of Richmond, Virginia;

Lawrence Cardinal Shehan, Archbishop of Baltimore, Maryland;

Paul A. Hallinan, Archbishop of Atlanta, Georgia;

Philip M. Hannan, Archbishop of New Orleans, Louisiana;

Robert E. Lucey, Archbishop of San Antonio, Texas;

Joseph B. Brunini, Apostolic Administrator of Natchez-Jackson, Mississippi;

Lawrence M. DeFalco, Bishop of Amarillo, Texas;

Joseph A. Dirick, Apostolic Administrator of Nashville, Tennessee;

Thomas K. Gorman, Bishop of Dallas-Ft. Worth, Texas;

Joseph H. Hodges, Bishop of Wheeling, West Virginia;

John L. Morkovsky, Apostolic Administrator of Galveston-Houston, Texas;

Victor J. Reed, Bishop of Oklahoma City and Tulsa, Oklahoma;

L. J. Reicher, Bishop of Austin, Texas;

Thomas Tschoepe, Bishop of San Angelo, Texas;

Ernest L. Unterkoefler, Bishop of Charleston, South Carolina; and

Vincent S. Waters, Bishop of Raleigh, North Carolina.

These bishops, as pastors of their respective dioceses, are committed to the proposition that "with regard to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent." (Vatican Council II, *Pastoral Constitution on the Church in the Modern World.*)

The National Catholic Conference for Interracial Justice, a non-profit corporation, was organized in 1960, as an agency which serves nearly 150 Catholic human relations organizations throughout the United States, 26 of them in the south. The Conference works to end racial discrimination and prejudice, and to foster interracial justice in all areas of life.

The National Catholic Social Action Conference, founded in 1957, is a non-profit association of approximately 500 individuals and 30 organizations interested in Christian social action. Its membership is composed chiefly of members and leaders of social action groups throughout the nation, variously drawn from labor, management, and industrial relations groups; Roman Catholic diocesan social action groups; rural life and urban life groups; interracial groups, and cooperatives. The Conference is interested in this case, as amicus curiae, due to the serious issues of personal liberty which it presents.

The individuals and organizations submitting this brief believe that they may serve this honorable Court in its determination of this case by bringing to the attention of the Court two questions which they believe are involved herein, each of which poses an important issue relating to the personal liberties of citizens of the United States.

SUMMARY STATEMENT OF THE CASE

Appellants, Richard Perry Loving and Mildred Jeter Loving, were convicted on January 6, 1959, in the Circuit Court of Caroline County, Virginia, under an indictment charging that "the said Richard Perry Loving being a White person and the said Mildred Delores Jeter [Loving] being a Colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife." *Va. Code,* sec. 20-58 (1950).

The appellants were each sentenced to one year in jail, which sentences were suspended "for a period of twenty-five years upon the provision that both accused leave Caroline County and the State of Virginia at once and do not return together or at the same time to said county and state for a period of twenty-five years."

On November 6, 1963, the appellants filed a motion to vacate judgment and set aside sentence on the ground that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid. This motion was denied on January 22, 1965. On appeal to the Supreme Court of Appeals of Virginia, that court held, on March 7, 1966, that "that portion of the order appealed from upholding the constitutionality of Code, secs. 20-58 and 20-59, and the convictions of the [appellants] thereunder, is affirmed; that portion of said order upholding the validity of the sentences imposed is reversed...."

The appellants appealed from this judgment of March 7, 1966, of the Supreme Court of Appeals of Virginia, to the United States Supreme Court. On December 12, 1966, the United States Supreme Court noted probable jurisdiction.

ADDITIONAL QUESTIONS PRESENTED

The amici curiae submitting this brief concur in the views presented by appellants in this case on the following issues:

> That the Virginia anti-miscegenation laws violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution;
>
> That a state statute which proscribes marriage between members of different races violates the constitutional right of privacy;
>
> That a state statute which proscribes marriage between members of different races violates a constitutional right of freedom to marry;
>
> That a state statute which makes the color of a person's skin the test of whether his marriage constitutes a criminal offense is invalid under the United States Constitution; and
>
> That the Virginia anti-miscegenation statutes deprive the appellants of the civil rights guaranteed by Title 42 U.S.C. sec. 1981.

Additionally, the amici curiae submitting this brief desire to bring to the attention of the Court the following two questions:

> 1. Whether the Virginia anti-miscegenation laws (Va. Code, secs. 20-50 et seq. (1950) and Va. Code, secs. 1-14 (Supp. 1964)) constitute an in-

valid restriction on the free exercise of religion guaranteed by the United States Constitution?

2. Whether the Virginia anti-miscegenation laws constitute an invalid restraint on the right to have and to raise children?

ARGUMENT

I. The Anti-Miscegenation Statutes Prohibit the Free Exercise of Religion Guaranteed by the United States Constitution and Are, Therefore, Invalid.

The First Amendment to the United States Constitution states that "Congress shall make no law . . . prohibiting the free exercise" of religion. While this Amendment, by its express terms, places a limitation upon the Congress only, it is made applicable to the states and their legislatures by the Fourteenth Amendment to the Constitution. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

It should be emphasized that we are concerned here with *personal* liberty, *personal* rights. It is the individual's free exercise of religion that is safeguarded by the United States Constitution. *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), in describing the area of personal liberty protected by the due process clause of the Fourteenth Amendment, speaks of the "right of the individual . . . to marry, establish a home and bring up children, *to worship God according to the dictates of his own conscience. . . .* " (Italics added.)

Religion does not pertain to the mind alone; it involves the whole person. Religion does not encompass belief alone; it involves action. And in wise recognition of this fact, the Constitution not only guarantees "freedom of conscience and freedom to adhere to such religious organization or form of worship as the in-

dividual may choose," but it also "safeguards the free exercise of the chosen form of religion." *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

Marriage is a fundamental act of religion, and, because of this, marriage comes within the Constitutionally-protected "free exercise of religion." It is submitted that this proposition that marriage is a fundamental or basic act of religion is not a determination of law, but rather of theology. To understand the religious significance of marriage, recourse must be made to theology. The following remarks on the theology of marriage are presented solely for the purpose of pointing up the importance of marriage as a religious act to the individual person who is committed to one or other of the major religious faiths in the United States.

In Catholic theology, for example, marriage is a sacrament, and a sacrament is seen as a "divine bestowal of salvation in an outwardly perceptible form which makes the bestowal manifest." Schillebeeckx, *Christ the Sacrament of the Encounter With God,* p. 15. (1963). The Christian sees the man Jesus as the personal visible realization of the divine grace of redemption, as "*the* sacrament, the primordial sacrament, because this man, the Son of God himself, is intended by the Father to be in his humanity" the way to the actuality of redemption. Schillebeeckx, *op. cit. supra,* at 15. (Although differing greatly in his view of sacramental theology, the Protestant theologian Harvey Cox also speaks of Jesus as *the* sacrament of God. Cox, *God's Revolution and Man's Responsibility,* p. 104 (1965).)

Not only does the Catholic Christian believe that Jesus is the primordial sacrament, but he also believes

that the Church is the sacrament of the risen Christ. He, therefore, views the sacraments of the Church (baptism, confirmation, penance, the Eucharist, holy orders, matrimony, and the annointing of the sick) as the personal acts of the risen Christ himself, but realized in the visible form of an act of the Church.

So important are these sacraments, including marriage, in the life of the Catholic Christian, that a Council of the Church would say that "all true justification either begins through the sacraments, or once begun, increases through them, or when lost is regained through them." (Council of Trent, 1545-1563; Denzinger, *Enchiridion symbolorum,* no. 843a (24th ed.).) Through the sacraments, the individual encounters Christ at the decisive moments of the individual's personal history. "The special grace of the sacrament of matrimony consists in the fact that the married couple participate in a specific way in the salvific mystery of Christ and the Church, and conversely, that that perfect and final Covenant which God himself in his gracious clemency has entered into with man, is historically betokened (becomes historically tangible) in marriage." Rahner and Vorgrimler, *Theological Dictionary,* p. 275 (1965).

The foregoing discussion of marriage reflects Catholic theological studies, but a similar importance is accorded marriage as an act or exercise of religion in Protestant and Orthodox Christianity and in Judaism.

One of the leading American theologians of the Orthodox Church has written:

> "In the Eastern church matrimony is a sacrament. . . . [T]he Church calls sacraments those decisive acts of its life in which this transforming grace is confirmed as being given, in which the

> Church through a liturgical act identifies itself with and becomes the very form of that Gift. . . . ." Schmemann, *Sacraments and Orthodoxy,* p. 99 (1965).

Similarly, it is stated in Demetrakopoulos, *Dictionary of Orthodox Theology,* p. 125 (1964), that "marriage is the sacrament by which the union of man and woman is made lawful before God."

The Anglican Church also views matrimony as a sacrament, and in a report from the 1958 Lambeth Conference, it is stated:

> ". . . The Prayer Book, looking back at the deep teaching of the Epistle to the Ephesians, speaks of marriage as the closest thing we can know to the unity which exists 'betwixt Christ and his church.' . . .
>
> The family is the God-given environment within which souls are born, to learn first the lessons of human individuality and dignity, of responsible freedom and redemptive love; the lessons which in due course must be lived out in the wider and deeper associations of humanity in Christ." *The Lambeth Conference 1958: The encyclical letter from the bishops together with the resolutions and reports,* pp. 2.150-2.151 (1958).

Although many of the churches in the Protestant Christian tradition may not adhere to a strictly sacramental view of marriage, it is clear that marriage does have deep religious significance in such churches. Karl Barth has referred to marriage as "the matter of a special divine calling, . . . [which] is wholly subject to the divine command." Barth, *Church Dogmatics,* v. III, part 4, p. 184 (1961). Another prominent Protestant theologian, Emil Brunner, has written:

"From the hand of the Creator do I first receive my partner in marriage as 'mine,' and through this become 'his' or 'hers.' This is the order of creation in marriage; therefore, although not a Sacrament . . . marriage is a sacred thing." Brunner, *The Divine Imperative: A Study in Christian Ethics,* p. 348 (1947).

In Judaism, marriage is viewed as having "profound religious significance." Kahana, *The Theory of Marriage in Jewish Law,* p. 27 (1966). "Judaism . . . considers [marriage] as a sacred trust entered into between the bridegroom and the bride. Jewish marriage is not only a civil relationship; it is not only a social institution; it is a sanctification encompassing an entire philosophy and way of life." Goodman and Goodman, *The Jewish Marriage Anthology,* viii (1965).

This theological perspective of marriage has been presented in order to show that marriage is much more than a social event or the commencement of a social relationship, that marriage, whether regarded technically as a sacrament or not, is held by the major religious faiths in the United States to be an important act of religion.

It must be emphasized that the teachings or laws of some of the churches or religious bodies in the United States even exclude specifically any restriction on marriage based upon racial considerations. As early as 1843, an American Catholic theologian stated:

> "In some states, marriage between whites and Negroes is prohibited by law and considered invalid. However, they are valid by ecclesiastical law so long as the impediment of servile condition does not occur. If some wish to enter such a marriage, they cannot be forbidden the sacraments be-

cause of a legal prohibition or public opinion since they are exercising a natural right which the Church in no way prohibits." Kenrick, *Theologiae Moralis,* III, p. 334 (1843), quoted in Leonard, *Theology and Race Relations,* p. 157 (1963). See also Doherty, *Moral Problems of Interracial Marriage* (1949).

As recently as January 28, 1967, the Convention of the Episcopal Church of the Diocese of Washington, after stating that matrimony has always been a sacrament of the church, that Christian tradition supports the right of persons to choose their marriage partners, and that there is no theological or biological reason against interracial marriage, went on record in favor of the repeal of all existing laws which seek to control the race of marriage partners and of all laws which forbid interracial marriage. In the course of this resolution, the Convention called attention to Canon 16, section 4, of the Canon law of the Episcopal Church which provides that no member of the Church shall be excluded from the sacraments of the Church because of race, color, or ethnic origin.

One of the committees at the Evanston Assembly of the World Council of Churches urged the Church to "withhold its approval of all discriminatory legislation affecting the educational, occupational, civic or marital opportunities based on race." Duff, *The Social Thought of the World Council of Churches,* p. 243 (1956). And this committee report was reinforced by resolutions adopted by the entire Assembly, one of which declared that "any form of segregation based on race, colour or ethnic origin is contrary to the Gospel, and is incompatible with the Christian doctrine of man and with the nature of the Church of Christ." Duff, *op. cit. supra,* at p. 243.

Since marriage is an important act of religion, it comes within that "free exercise of religion" guaranteed to the individual by the First and Fourteenth Amendments to the United States Constitution.

While it is certainly true, as stated in *Maynard v. Hill,* 125 U.S. 190, 205 (1888), that marriage "has always been subject to the control of the legislature," this does not mean that it is subject to the *unlimited* or *unrestricted* control of the legislature. Marriage is an act, an exercise, of religion, and although the freedom to act, as distinguished from the freedom to believe, is not absolute, *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940), still the First Amendment freedoms, including the free exercise of religion, are "susceptible of restriction only to prevent *grave and immediate danger* to interests which the state may *lawfully* protect." (Italics added.) *Board of Education v. Barnette,* 319 U.S. 624, 639 (1943).

If it is acknowledged that marriage is subject to *some* control by the state legislature, what restrictions then may the state validly impose upon marriage? *Maynard v. Hill,* 125 U.S. 190 (1888), has been cited by various state courts in their discussion of the power of the states over marriage and has been used to justify rulings sustaining anti-miscegenation statutes. See, for example, *Loving v. Commonwealth,* 206 Va. 924, 147 S.E.2d 78, 82 (1966); *Naim v. Naim,* 87 S.E.2d 749, 751 (Va. 1955); *State v. Tutty,* 41 Fed. 753, 758 (S.D. Ga. 1890); *Kirby v. Kirby,* 206 Pac. 405, 406 (Ariz. 1922). But *Maynard v. Hill* actually concerned the power of the Oregon territorial legislature to grant a divorce, and it is not authority for the validity of statutes forbidding interracial marriage. It is well to note that the Court in *Maynard v. Hill,* after stating that mar-

riage is subject to the control of the legislature, then gave the following as examples of those aspects of marriage subject to regulation: the age at which the parties may marry; the procedures or form essential to constitute marriage; the duties and obligations created by marriage; the effect of marriage upon the property rights of the spouses; and the acts that constitute grounds for divorce. While it is not contended that the Court intended this listing of aspects of marriage that may be subjected to regulation to be exclusive, yet it is relevant that none of these aspects said to be subject to regulation bear any resemblance or relation to that aspect of marriage at which anti-miscegenation statutes are aimed.

Marriage comes within the "free exercise of religion" clause, made applicable to the states by the Fourteenth Amendment, and it can be restricted only to prevent "grave and immediate danger to interests which the state may lawfully protect." *Board of Education v. Barnette,* 319 U.S. 624, 639 (1943). The statements in *Maynard v. Hill* concerning the power of the states over marriage must be qualified to reflect this important limitation.

A case involving governmental regulation of marriage wherein it was contended that the regulation unconstitutionally prohibited the "free exercise of religion" was before the United States Supreme Court in *Reynolds v. United States,* 98 U.S. 145 (1878). In *Reynolds v. United States,* the Court upheld a conviction for bigamy against the contention that it was the duty of the defendant, as a male member of the Mormon Church, "circumstances permitting, to practice polygamy." The Court, after noting that "polygamy has always been odious among the northern and

western nations of Europe" and that "at common law, the second marriage was always void," then stated that society is built upon marriage and that "according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests." 98 U.S. at 165-166. The Court cited Professor Lieber as authority for the proposition that "polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy." 98 U.S. at 166.

In view of these statements by the Court, and without inquiring whether the social theory reflected in those statements would be accepted today, it would seem correct to state that the Court held that polygamous marriages could be prohibited, despite the contention that such marriages came within the "free exercise of religion," because it had concluded that polygamous marriages were inherently objectionable as constituting a danger to the "principles on which the government of the people, to a greater or less extent, rests." However, this objection cannot be levied against interracial marriages. Interracial marriages do not constitute a threat to the "principles of government" made manifest in the United States Constitution. This is all the more true when we remember that state anti-miscegenation statutes involve a classification based upon race and that the "central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964). Certainly, the elimination of racial discrimination emanating from governmental sources is now a "principle of government."

Another distinction between polygamous marriages, which may be prohibited, and interracial marriages is that recent anthropological studies indicate that the structure of the family based upon polygamy, *because of its very nature,* may be harmful to the family members. See Hsu, *Psychological Anthropology,* p. 61 (1961); Beattie, *Other Cultures,* pp. 132-135 (1964).

On the other hand, no proof has been offered by scientists that an interracial marriage, *because of the nature of such a marriage,* is likely to engender similar harmful effects. An anthropologist, Clyde Kluckhohn, has written that "nowhere in the 'race' field is mythology more blatant or more absurd than in the beliefs and practices relating to 'miscegenation'." Kluckhohn, *Mirror for Man,* p. 114 (1963). Moreover, "there is no evidence that race mixture is harmful. There is no scientific basis for an overall rating of races on a superiority-inferiority scale." Kluckhohn, *op. cit. supra,* p. 117. The parties to an interracial marriage or their children may suffer, but this is not because of anything inherent in the family structure of the marriage. Rather it is due to the lack of understanding and the race prejudice that an interracial family may encounter. In short, this suffering is due to the reaction of third parties, not to the marriage itself. Thus, a polygamous marriage differs from an interracial marriage in that the former by its very nature may have detrimental effects upon members of the family, while this is not true in the case of the interracial marriage.

In view of these distinctions between a polygamous marriage and an interracial marriage, *Reynolds v. United States* is not authority for the proposition that the state may prohibit an interracial marriage even though the marriage is an "exercise of religion."

It is submitted that the Commonwealth of Virginia and some other states have prohibited interracial marriages, not because such marriages constitute a "grave and immediate danger to interests which the state may *lawfully* protect" (and this is the test as stated in *Board of Education v. Barnette,* 319 U.S. 624, 639 (1943), for measuring restraints upon the "free exercise of religion"), but because interracial marriages constitute an ultimate denial of the principles and philosophy of a racially-segregated society.

However, the United States Supreme Court has affirmed quite recently that the "strong policy [of the Fourteenth Amendment] renders racial classifications 'constitutionally suspect,' *Bolling v. Sharp,* 347 U.S. 497, 499; and subject to the 'most rigid scrutiny,' *Korematsu v. United States,* 323 U.S. 214, 216; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States,* 320 U.S. 81, 100." *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964). In a concurring opinion in *McLaughlin v. Florida,* Mr. Justice Stewart, joined by Mr. Justice Douglas, stated that he could not "conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense." 379 U.S. at 198. And yet that is exactly what the Commonwealth of Virginia has done in declaring the parties to an interracial marriage to be guilty of a felony.

Only to prevent a "grave and immediate danger to interests which the state may *lawfully* protect" may the free exercise of religion, including marriage, be restrained. The preservation of a racially segregated society is not an interest which the state may *lawfully* protect.

To uphold the validity of a statute prohibiting or invalidating marriages simply because of a difference in the race of the spouses would be to permit the racial views of third persons to determine one of the most personal and sensitive of human decisions. In the absence of any grave danger to the lawful interests of the state, this is a decision that belongs solely to the man and woman contemplating marriage. If the Virginia anti-miscegenation statute were to be upheld, then the words of Mr. Justice Traynor of the Supreme Court of California would be most apt:

> ". . . A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains." *Perez v. Sharp,* 32 Cal. 2d 711, 725, (*sub nom. Perez v. Lippold*) 198 P.2d 17, 25 (1948).

If it is contended that in some areas the marriage of persons of different races may result in tension and that this is "grave and immediate danger" the state is attempting to alleviate by the enactment and enforcement of anti-miscegenation laws, then, again quoting Mr. Justice Traynor, it is "no answer to say that race tension can be eradicated through the perpetuation by law of the prejudices that give rise to the tension." 32 Cal.2d at 725, 198 P.2d at 25. A similar decision was reached in *Cox v. Louisiana,* 379 U.S. 536 (1965), a case involving a civil-rights demonstration, wherein the Court said:

> ". . . Here again, as in *Edwards* [*v. South Carolina,* 372 U.S. 229 (1963)], this evidence 'showed no more than that the opinions which . . . [the

> students] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.' *Edwards v. South Carolina, supra,* at 237. Conceding this was so, the 'compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise.' *Watson v. Memphis,* 373 U.S. 526, 535." *Cox v. Louisiana, supra,* at 551.

The Supreme Court of California, in *Perez v. Sharp,* 32 Cal.2d 711, (*sub nom. Perez v. Lippold*) 198 P.2d 17 (1948), by a four-to-three decision, held that the California anti-miscegenation statute prohibiting marriages of "white persons with negroes, Mongolians, members of the Malay race, or mulattoes" was violative of the United States Constitution and, therefore, invalid. In an opinion in which two other members of the majority concurred, Mr. Justice Traynor stated that if the California anti-miscegenation statute was discriminatory and irrational, it unconstitutionally restricted both religious freedom and the liberty to marry.

In a separate concurring opinion, Mr. Justice Edmonds forcefully asserted his conclusion that

> ". . . marriage is 'something more than a civil contract subject to regulation by the State; it is a fundamental right of free men.' Moreover, it is grounded in the fundamental principles of Christianity. The right to marry, therefore, is protected by the constitutional guarantee of religious freedom. . . .
>
> "Reasonable classification, therefore, is not the test to be applied to a statute which interferes with one of the fundamental liberties which are pro-

tected by the First Amendment. The question is whether there is any 'clear and present danger' justifying such legislation . . ., and the burden of upholding the enactment is upon him who asserts that the acts which are denounced do not infringe upon the freedom of the individual. . . .

"The decisions upholding state statutes prohibiting polygamy come within an entirely different category. In Reynolds v. United States, 98 U.S. 145, . . . marriage was said to be, 'from its very nature a sacred obligation,' but the conviction was sustained upon the ground that polygamy violates 'the principles upon which the government of the people, to a greater or less extent, rests.' Later, the court characterized the practice of polygamy as being 'contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world.' Mormon Church v. United States, 136 U.S. 1 . . .; see Davis v. Beason, 133 U.S. 333. . . . In effect, therefore, these cases rest upon the principle that the conduct which the legislation was designed to prevent constituted a clear and present danger to the well being of the nation and, for that reason, the statute [prohibiting polygamy] did not violate constitutional guarantees." 32 Cal.2d at 741-742, 198 P.2d at 34-35.

In summary, we respectfully submit that marriage is an exercise of religion protected by the First and Fourteenth Amendments to the United States Constitution; that, as such, marriage can be restrained only upon a showing that it constitutes a grave and immediate danger to interests which the state may lawfully protect; and that interracial marriages do not constitute any danger to any interest which the state may lawfully protect.

II. The Anti-Miscegenation Statutes Are Unconstitutional as Denying the Right To Beget Children.

The Virginia anti-miscegenation statutes, by their prohibition of marriage between persons of different race, are unconstitutional upon their face for the further reason that they deny to such persons the right to beget children. Since the statutes make race the test of whether a man and woman may marry, they therefore bar those who cannot meet this racial test from one of the chief lawful rights in marriage, the having of children. So long as the statutes are deemed valid legislation, the issue of the union contracted by any such persons must be deemed illegitimate. Such persons may have children only if they are willing to pay the penalty of having them legally denominated as bastards.

Whatever may be said of the power of the state directly to deny to individuals the exercise of procreative powers on account of mental deficiency (see, *e.g., Buck v. Bell,* 274 U.S. 200 (1927)) or habitual criminality (see, *e.g., Skinner v. Oklahoma,* 316 U.S. 535 (1942)), the state is without power directly or indirectly to inhibit its citizens in the exercise of such powers solely on account of their race.

The right to beget children is recognized as a fundamental human right. In striking down the California anti-miscegenation statute, the Supreme Court of California stated:

> "The right to marry is as fundamental as the right to send one's child to a particular school or *the right to have offspring.* Indeed, 'We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and sur-

> vival of the race.' (*Skinner v. Oklahoma, supra,* at 541.) . . . .
>
> . . .
>
> ". . . In the absence of an emergency the state clearly cannot base a law impairing fundamental rights of individuals on general assumptions as to traits of racial groups. . . ." *Perez v. Sharp,* 32 Cal.2d 711, 715-716, (*sub. nom. Perez v. Lippold,* 198 P.2d 17, 19-20 (1948)). (Italics added.)

The California Supreme Court did not view interracial marriage as posing any "clear and present danger arising out of an emergency."

The Supreme Court of the United States, in *Skinner v. Oklahoma, supra,* a case involving the constitutionality of an Oklahoma statute providing for the sterilization of habitual criminals, stressed the fundamental nature of the right to beget children. In declaring the statute void (for reasons not germane to the instant discussion), Justice Douglas, speaking for the Court, said:

> "We are dealing here with legislation which involves *one of the basic civil rights of man.* Marriage *and procreation* are *fundamental* to the very existence and survival of the race." (Emphasis supplied). 316 U.S. 535, 541.

In so speaking, the Court made no innovation but merely gave emphasis to its long-settled view of the fundamental character of the right. In *Meyer v. Nebraska,* 262 U.S. 390 (1923), the Court had denominated, as a right included within the "liberty" guaranteed by the Fourteenth Amendment, "the right of the individual . . . to marry, establish a home and bring up children . . ." 262 U.S. 390, 399.

Article 16-1 of the United Nations' Universal Declaration of Human Rights (December 10, 1948) provides international recognition to the right as fundamental in character:

> "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family . . ."

The Virginia anti-miscegenation statutes clearly contravene a fundamental liberty guaranteed by the due process clause of the Fourteenth Amendment. Moreover, since these statutes create an unreasonable classification (one based solely on race) between those who may marry and lawfully beget children and those who may not, the said statutes are also violative of the equal protection clause of the Fourteenth Amendment. *Brown v. Board of Education,* 347 U.S. 483 (1954).

CONCLUSION

It is submitted that the decision of the Supreme Court of Appeals of Virginia upholding the constitutionality of the anti-miscegenation statutes involved was in error and that this Court should reverse the judgment below.

Respectfully submitted,

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February, 1967

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IN THE

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OCTOBER TERM, 1966

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v.

VIRGINIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

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BRIEF FOR APPELLANTS

Preliminary Statement

This important case presents the question whether the United States Constitution invalidates those laws of Virginia which prohibit and penalize the marriage of a man and a woman and their subsequent living together simply because one of the couple is Negro and the other is white. It gives this Court an appropriate opportunity to strike down the last remnants of legalized slavery in our country—the anti-miscegenation laws of Virginia and sixteen other states which ban Negro-white marriages. This Court has never ruled on the constitutionality of the anti-misce-

genation laws. No other civilized country in the world has such laws except the Union of South Africa.

Citation to Opinions Below

The opinion of the Circuit Court of Caroline County, Virginia (R. 8) is not officially reported. The opinion of the Supreme Court of Appeals of Virginia is reported at 206 Va. 924, 147 S. E. 2d 78 (1966) (R. 19-27).

Jurisdiction

On January 6, 1959, appellants, who were represented by counsel, pleaded guilty and were convicted in the Circuit Court of Caroline County of violating Virginia's anti-miscegenation* statutes. The specific charge in the indictment (R. 5-6) was that they left Virginia and contracted a miscegenetic marriage in the District of Columbia with the intention of returning to and actually returning and cohabiting as man and wife in Virginia in violation of Va. Code § 20-58. They were each sentenced to one year in jail but their sentences were suspended by Judge Leon M. Bazile for a period of twenty-five years, upon the condition that they immediately leave Caroline County and the State of Virginia and not return together or at the

* The term "miscegenation", derived from the Latin "miscere" (to mix) and "genus" (race), was coined in an anonymously published political pamphlet, "Miscegenation: The Theory of the Blending of the Races, Applied to the American White Man and Negro". It was written by Democrats David Goodman Croly and George Wakeman, primarily in order to use the race issue in the 1864 Presidential election by attributing the pamphlet's favorable views on racial intermixing to the Republicans. BLOCH, MISCEGENATION, MELALEUKATION AND MR. LINCOLN'S DOG 37-42 (Schaum Publ. Co., N. Y. 1958); S. Kaplan, "Miscegenation Issue in the Election of 1864", XXXIV *Journal of Negro History* 277 (July, 1949).

same time to the county or state for twenty-five years (R. 6).

On November 6, 1963, appellants filed a Motion to Vacate Judgment and Set Aside Sentence (R. 7) in the Circuit Court of Caroline County which was denied by an Order of Judge Bazile on January 22, 1965 (R. 17).

Appellants then appealed to the Supreme Court of Appeals of Virginia which heard the case on the merits. On March 7, 1966, the Supreme Court of Appeals of Virginia affirmed the convictions of appellants, set aside their sentences,* and remanded for further sentencing not inconsistent with its opinion (R. 28). However, on March 28, 1966, the Supreme Court of Appeals of Virginia issued an Order staying execution of its judgment of March 7, 1966, so that appellants "may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for appeal to review the judgment of this Court" (R. 28) (Omitted in printing).

Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of Appeals of Virginia on May 31, 1966 (R. 29). Jurisdiction of this Court rests upon 28 U. S. C. § 1257 (2). *Williams* v. *Bruffy*, 96 U. S. 176 (1877); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Griswold* v. *Connecticut*, 381 U. S. 479 (1965). Probable jurisdiction was noted December 12, 1966 (R. 32).

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* The highest Virginia court held that the condition imposed by Judge Bazile in suspending the sentences was unreasonable since cohabitation in Virginia by the Lovings, as man and wife, which the highest Virginia court termed "the real gravamen of the offense charged" against them, could be prohibited without preventing appellants from returning together to the State.

Constitutional and Statutory Provisions Involved

1. Petitioners were convicted of violating VA. CODE ANN. § 20-58 (1950) (Vol. 4, p. 491), which provides:

> § 20-58. *Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

2. This case also involves:

(i) VA. CODE ANN. § 20-59 (1950) (Vol. 4, p. 492), which provides:

> § 20-59. *Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

(ii) VA. CODE ANN. § 20-57 (1950) (Vol. 4, p. 491), which provides:

> § 20-57. *Marriages void without decree.*—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.

(iii) VA. CODE ANN. § 20-54 (1950) (Vol. 4, p. 489), which provides:

> § 20-54. *Intermarriage prohibited; meaning of term 'white persons.'*—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.

(iv) VA. CODE ANN. § 1-14 (Supp. 1964) (Vol. 1, p. 12), which provides:

> § 1-14. *Colored persons and Indians defined.*—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians.

3. This case also involves the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Do the Virginia anti-miscegenation laws violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

2. Can a State, either by its criminal or civil law, constitutionally prohibit and penalize a marriage between and cohabitation by two of its residents because one of them is Negro and the other is white?

Statement of the Case

On or about June 2, 1958, Mildred Jeter, a Negro female, and Richard Perry Loving, a white male, were lawfully married in the District of Columbia pursuant to its laws. There is no dispute here that Mrs. Loving is a "colored person" and Mr. Loving is a "white person" within the definitions of those terms in the Virginia Code or that, at all times relevant to this litigation, the Lovings were residents of Virginia (R. 20).

Shortly after their marriage, appellants returned to Virginia and established their marital abode in Caroline County. On July 11, 1958, warrants were issued charging them with attempting to evade the Virginia ban on interracial marriages (R. 2). Thereafter, a grand jury of Caroline County indicted them in the following manner:

> The said Richard Perry Loving, being a white person, and the said Mildred Delores Jeter, being a colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of

> Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth (R. 5-6).

On January 6, 1959, the Lovings entered pleas of guilty, and they were each sentenced to one year in jail but their sentences were suspended, as previously explained, on the condition that they leave Virginia and not return together for twenty-five years.

After their convictions and until the summer of 1963, the Lovings took up residence in the District of Columbia. Subsequently, they retained counsel who have represented them in their attempts to reverse the judgment and set aside the sentences of the Circuit Court of Caroline County so that they may live peacefully and without fear of legal prosecution in their home state.

On October 28, 1964, appellants instituted a class action in the United States District Court for the Eastern District of Virginia, requesting that a three-judge federal court be convened to declare the Virginia anti-miscegenation laws unconstitutional and to enjoin the State officials from enforcing appellants' prior convictions.

On February 11, 1965, the three-judge federal court (Judges Bryan, Butzner and Lewis) entered an interlocutory order continuing the matter so that appellants herein might have a reasonable time to "submit [the] issue [therein] to the state courts for final determination." Since the summer of 1963 and during the pendency of all

court proceedings thereafter and at the present time, the Lovings have continued to reside in Virginia, safe from further arrest and prosecution only because the three-judge federal court's interlocutory order stated that:

> . . . in the event the plaintiffs [Lovings] are taken into custody in the enforcement of the said judgment and sentence, this court, under the provisions of title 28, section 1651, United States Code should grant the plaintiffs bail in a reasonable amount during the pendency of the State proceedings in the State Courts and in the Supreme Court of the United States, if and when the case should be carried there . . . .

Summary of Argument

This case challenges the validity of the entire Virginia statutory scheme prohibiting and penalizing miscegenation. There is no legal argument of any merit which would allow Virginia to punish its residents who enter into miscegenetic marriages within the State and, on the other hand, prohibit Virginia from punishing couples who go out of the State to evade the anti-miscegenation laws. Furthermore, any holding that the particular evasion statute, Section 20-58, under which the Lovings were convicted, is invalid on some limited ground would not do justice to appellants because their marriage under settled Virginia case law would be void. Thus they would be subject to further prosecution for the same acts that have caused the convictions from which they appeal, namely, the interracial nature of their marriage together with their cohabitation as man and wife in Virginia. Also, they would suffer the outrageous civil effects of being parties to a

void miscegenetic marriage: they would not be able to inherit from each other; their three children would be deemed illegitimate; they could lose Social Security benefits, the right to file joint income tax returns and even rights to workmen's compensation benefits—all of which are contingent upon a valid marital relationship.

Accordingly, this case requires a determination whether a State, either by its criminal or civil law, can constitutionally prohibit and penalize a marriage between two competent, consenting adults and their cohabitation within such State solely because one of them is Negro and the other is white.

The Virginia anti-miscegenation laws were originally passed primarily for economic and social reasons as means to foster and implement the institution of slavery. To a lesser extent, they were also the products of the majority white group's racial and religious prejudices and fears of the Negro. The present Virginia statutory scheme as enacted in 1924 both incorporated many past miscegenation laws and expanded the prohibitions on interracial marriage. This legislation, however, was motivated primarily by racial intolerance and antagonism directed against the Negro, and sought to preserve only the integrity of the so-called "White Race" for reasons intellectually analogous to Hitler's goal of creating a Super Race.

In light of the history, symbolic meaning and effects of miscegenation laws, their deleterious social impact on our people, both Negro and white, is immeasurable. So long as they exist they will continue to perpetuate racial bitterness and constitute an open affront to the dignity of the individual Negro American.

A correct appraisal of the legislative history of the Fourteenth Amendment shows that anti-miscegenation laws were not exempted from the application of its broad guarantees of equal protection and due process of law. These guarantees were open-ended and meant to be expounded in light of changing times and circumstances to prohibit racial discrimination.

Virginia's miscegenation laws violate the equal protection and due process clauses of the Fourteenth Amendment. The principle of *Brown* v. *Board of Education*, 347 U. S. 483 (1954)—however it is articulated—controls the constitutionality of these laws and makes clear their invalidity under the equal protection clause. Similarly, there is a constitutionally protected right of marriage which these laws arbitrarily and capriciously infringe in violation of due process of the law. While the States have an interest in and the power to regulate marriages, restrictions on marriage based on race are constitutionally suspect. The State has the burden to show an overriding legislative purpose to justify such restriction. There is no such purpose to justify anti-miscegenation laws.

ARGUMENT

I.

The validity of the entire Virginia statutory scheme prohibiting interracial marriage is at issue in this case.

The "evasion statute", Section 20-58, under which appellants were convicted supplements Virginia's basic prohibition of Negro-white marriages celebrated within Virginia (Va. Code § 20-54); it deals with Virginia residents* who leave the State with the intention of returning in order to marry in a State permitting Negro-white marriages and who then return and cohabit in Virginia as man and wife. By the terms of the evasion statute, a marriage of such a couple "shall be governed by the same law as if it had been solemnized in this State." Accordingly, such couples are (i) subject to the same criminal punishment as Negroes and whites who marry in Virginia, namely, the penalty imposed by Va. Code § 20-59 of imprisonment for not less than one nor more than five years, and (ii) their marriages are considered void under Virginia law. Va. Code § 20-57; *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749 (1955) (In an annulment action, marriage held void where the Virginia couple had gone to North Carolina to evade the Virginia law). Furthermore, the terms "white person" and "colored person" in the evasion statute are comprehensible, if at

* Unlike the situation in *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749, *vacated and remanded,* 350 U. S. 891 (1955), *aff'd,* 197 Va. 734, 90 S. E. 2d 849, *appeal dismissed,* 350 U. S. 985 (1956), there is no dispute that appellants were residents of Virginia at the time of their marriage and at all other times relevant to this litigation. Thus, there is no question here of the permissible application of the evasion statute to non-residents of Virginia.

all, only by use of the definitions in other provisions of Virginia's anti-miscegenation laws. (Va. Code § 20-54 defines "white person" and § 1-14 defines "colored person".)

Because appellants' miscegenetic marriage is void under Virginia law, various outrageous civil effects can result: one spouse may be prevented from inheriting from his or her mate by other heirs who prove the forbidden interracial nature of the marriage (see, *e.g.*, *In re Shun Takahashi's Estate*, 113 Mont. 400, 129 P. 2d 217 (1942)); participants in such marriages can lose their marital rights under intestacy and similar statutes, *Stevens* v. *United States*, 146 F. 2d 120 (10th Cir. 1944), and the benefits of Social Security (see 42 U. S. C. § 416(h)(1),* of joint income tax returns, and of workmen's compensation—all of which are contingent upon a marital relationship. *Toler* v. *Oakwood Smokeless Coal Corp.*, 173 Va. 425, 4 S. E. 2d 364 (1939). A husband may desert his mate and their children without the usual legal consequences and apparently free of any obligation of support. See generally GREENBERG, RACE RELATIONS AND AMERICAN LAW 348 (1959). The Lovings' three children may be illegitimate, *Greenhow* v. *James' Executor*, 80 Va. 636 (1885), even though a Virginia statute legitimatizes the issue of void marriages, and they may lose inheritance rights in their parents' estates.

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* For a recent example where a death gratuity usually payable to a widow of a U. S. military serviceman was not paid because the validity of anti-miscegenation laws remains in doubt see the letter of the Assistant Comptroller General of the United States dated January 6, 1965, which refused to authorize payment of arrears of pay and a death gratuity to the Negro widow of a deceased white soldier because the validity of their miscegenetic marriage which occurred in Texas "cannot be resolved on the basis of the current judicial decisions . . . " as quoted in Seidelson, *Miscegenation Statutes and the Supreme Court: A Brief Prediction of What the Court Will Do and Why*, CATHOLIC U. L. REV. 156, 157 (1966).

Even if there were no evasion statute (or if some technical ground could be found to invalidate only the evasion statute and leave the rest of Virginia's anti-miscegenation scheme in effect), appellants' situation would not be significantly changed. Under Virginia law, their marriage is void for both criminal and civil law purposes because Virginia follows the established conflict of laws principle that the state of the domicile of the parties at the time of their marriage will refuse to recognize its validity if the marriage is offensive to such State's public policy. *Kinney* v. *Commonwealth*,* 71 Va. 858 (1878); *Greenhow* v. *James' Executor*,** 80 Va. 636 (1885); See generally RESTATEMENT, CONFLICT OF LAWS §§ 133-134 (1934); RESTATEMENT (SECOND) CONFLICT OF LAWS § 132 (Ten. Draft No. 4-1957); Taintor, *Marriage in the Conflict of Laws*, 9 VAND. L. REV.

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* In *Kinney*, the conviction of a Negro spouse of a white woman for illegal cohabitation with her was upheld by Virginia's highest court even though the couple had been married in Washington, D. C. which recognized the validity of the marriage. The first Virginia evasion statute (Va. Acts of Assembly, 1877-78, ch. VII § 3 at p. 302) relating to Negro-white marriages had been enacted but was not in effect with respect to this case. Judge Christian in his opinion said that " . . . without such statute, the marriage was a nullity . . . denounced by the public law of the domicile [Virginia] as unlawful and absolutely void . . . the law of the domicile will govern in such case, and when they return, they will be subject to all penalties, as if such marriage had been celebrated within the state whose public law they have set at defiance . . . connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion." At 865-66, 869.

** In *Greenhow*, a miscegenetic marriage valid where performed in the District of Columbia was deemed void under Virginia law in a case holding the eleven children of such marriage to be illegitimate. This holding with respect to the nullity of such a marriage was incorporated into a statute in 1887 by means of a provision that such marriages of Virginia residents outside of Virginia were to be governed by the same law as if the marriages were solemnized in Virginia. VA. CODE ANN. § 2253 (1887).

607, 627-29 (1956). Thus the same civil effects of the marriage would result and also appellants would be subject to criminal prosecution for illegal cohabitation,* *Kinney* v. *Commonwealth, supra,* § 18.1-193 (VA. CODE ANN. 1950, Vol. 4, p. 253), or fornication, *McPherson* v. *Commonwealth,* 69 Va. 939 (1877), § 18.1-188 (VA. CODE ANN. 1950, Vol. 4, p. 253), or perhaps both.

The reality of Virginia's statutory scheme prohibiting miscegenation is clear. Both the evasion statute (§ 20-58) and the basic prohibition of miscegenetic marriages (§ 20-54) serve and are necessary to effect the same unjustifiable purpose; to prohibit and penalize interracial marriages involving persons who after their marriage reside as man and wife in Virginia. We doubt that the basic prohibition would be invoked against a couple married in Virginia if they did not cohabit there as man and wife. Of course the evasion statute requires cohabitation as an essential element of its proscribed crime. Nevertheless, any technical distinction between the statutes is academic. The constitutionality of the evasion statute, as applied to appellants in light of Virginia's clear public policy against miscegenation and the relevant conflict of laws principle, cannot be determined separately from a determination of the constitutionality of Virginia's civil and criminal bans on interracial marriages celebrated in Virginia. There is no constitutional or other legal argument of substance which would justify allowing Virginia to deny the validity of an interracial marriage, under its civil or criminal law, if such marriage were celebrated in Virginia while pro-

* It should be noted that Virginia has no specific statute prohibiting only interracial fornication or cohabitation. See, *e.g.,* the Florida interracial cohabitation statute invalidated in *McLaughlin* v. *Florida,* 379 U. S. 184 (1964).

hibiting Virginia from penalizing the marriage if the marriage of Virginia residents took place outside of Virginia.

Accordingly, a holding that the evasion statute is invalid, on some limited ground, without reaching the basic question of the validity of Virginia's bans on miscegenetic marriages, would seem disingenuous and incorrect under the circumstances. Of even more importance, such a holding would not do justice to appellants. Their marital life has been in continuous legal jeopardy for over eight and one-half years and their marriage, under settled Virginia law, with or without the evasion statute, is void. Therefore, they would be subject to further prosecution for the same acts that have caused their prior convictions, namely, the interracial nature of their marriage together with their cohabitation as man and wife in Virginia.

II.

The history of the Virginia anti-miscegenation laws shows they are relics of slavery and expressions of racism.

To understand that the Virginia anti-miscegenation laws at issue here are both relics of slavery and expressions of modern day racism which brand Negroes as an inferior race, it is necessary to consider their history.*

As Professor Wadlington has recently noted,** it is surprising that Virginia which prides itself on the story of

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* Counsel wish to thank Mr. Frank F. Arness for the use of his unpublished thesis which deals with the history of these laws and was written in partial fulfillment of the requirements for a master's degree in history at Old Dominion College, Norfolk, Virginia.

** Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966). (Hereafter cited as "Wadlington")

how one of her early white sons married an Indian princess* today maintains one of the strictest statutory bans on racial intermarriage. Virginia has enacted a great deal of anti-miscegenation legislation beginning in the seventeenth century and spanning a period of nearly three centuries to 1932 when the last enactment on this subject was passed.

Early History

The first Negroes arrived in the colony of Virginia in 1619. Their numbers increased slowly. White indentured servants served as the principal source of manpower in the early colonial period before plantation owners recognized the value of the Negro slave. See generally BRUCE, ECONOMIC HISTORY OF VIRGINIA IN THE SEVENTEENTH CENTURY, Vol. I, Chap. IX (MacMillan & Co. 1896). As late as 1673, white servants still outnumbered Negroes by four to one. REUTER, THE AMERICAN RACE PROBLEM: A STUDY OF THE NEGRO 136 (New York: Thomas Y. Crowell Company, revised ed. 1938) (Hereafter cited as "Reuter").

Generally, indentured white servants came from the lowest social strata in England or elsewhere and the Virginia colonists considered them originally on the same level as the Indian slave or servant and the Negro. A principal difference among persons of the servant class was their tenure of service; the white servant usually served out a seven-year contract while the Negro or Indian might be enslaved for life. As a result of their common status, this class intermixed to a considerable extent both within and outside the banns of marriage. Reuter, 134-138.

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* If John Rolfe and Pocahontas were married in Virginia today, they would be guilty of violating the anti-miscegenation law. VA. CODE ANN. § 20-54.

Some of the earliest actions of the colonial government involving miscegenation reflected religious prejudice against Christian-heathen intermixing. See Bruce, *supra*, Vol. II, pp. 109-110 and Wadlington, 1191. However, with the establishment of Negro slavery, economic reasons for restricting miscegenation became dominant. Slave-owners wanted protection from the loss of their slave property through intermarriage with a free white Christian by laws that all offspring of slaves with whites, whether free or indentured servants, would be deemed slaves.

By the 1660s, illegitimate births from relationships among Negro slaves and white masters presented problems primarily relating to the status of the children. A 1662 Act provided that any child of an "Englishman" and a "negro woman" should be slave or free according to the condition of the mother. 2 Laws of Va. 170 (Hening 1823). This kind of legislation, according to some historians, led to intentional slave breeding by slave-owners.

At the time of the 1662 Act, there was nothing to prevent interracial marriages of whites and Negroes. The colonial society and the church viewed any such marriages in a disparaging manner and in some cases mobs may have acted to apply extralegal punishment to the couples. Reuter, 137.

Apparently social pressure was insufficient to prevent such marriages, for in April of 1691, the Virginia Assembly passed the first law proscribing Negro-white marriages as part of "An Act for Suppressing Outlying Slaves." 3 Laws of Va. 86 (Hening 1823). One stated purpose of this Act was to prevent "that abominable mixture and spurious issue which hereafter may arise" from interracial

unions, demonstrating that racial prejudice as well as economic reasons led to the early miscegenation laws. The free white person marrying a Negro was to be banished from Virginia forever. (Considering the practical banishment of the Lovings in 1959, Virginia's policy has not changed much since 1691.) This same Act* provided that any English white woman who had a bastard by a Negro should pay the church wardens fifteen pounds or, in default of payment, she would be indentured for a term of five years. The child in each instance would be bound out by the church wardens until he or she reached thirty years of age.

In 1705, the Assembly eliminated the banishment penalty for miscegenation and instead imposed a six-month prison sentence, without bail, and a fine. Ministers marrying such persons were also penalized and, to this day, Virginia punishes a minister who performs such a marriage by a fine, one-half of which goes to the informer. VA. CODE ANN. § 20-60 (1960).

By the end of Virginia's colonial period, Negroes with few exceptions were enslaved. Negro children by a white father were free or bond according to the condition of the Negro mother. White women, free or bond, were severely penalized for bearing a child from a miscegenetic

* The primary purpose of this Act was to authorize the capture of "negroes, mulattoes and other slaves" who hide "in obscure places killing hoggs and committing other injuries to the inhabitants" by local sheriffs and their deputies who were specifically authorized, if such slaves "shall resist, run away or refuse to deliver and surrender . . . to kill and destroy such negroes, mulattoes and other slave or slaves by gunn or any otherwaise whatsoever." If any slave were so killed, the owner was to receive "four thousand pounds of tobacco by the publique". At this time, slaves were legally considered to be personal property and treated the same as household goods, horses, cows, oxen and hogs. Bruce, *supra*, Vol. II, pp. 99-100.

union and such child was bound out in prescribed periods of servitude by the parish vestrymen. Finally, the legislature had constructed a law punishing the free white partner of a miscegenetic marriage by both imprisonment and fine.

No change of significance occurred until the Code of 1849 in which it was provided that any marriage between a white person and a Negro was absolutely void without further legal process. VA. CODE ch. 109 § 1, Vol. I at 471 (1849) (now § 20-57).

After the Civil War no essential changes were made in Virginia's anti-miscegenation laws until the enactment of the Racial Integrity Act of 1924.* However, the first evasion statute, the predecessor of Section 20-58 under which the Lovings were convicted, was passed in 1878 to deal with interracial couples leaving the State to marry in a jurisdiction which allowed their marriages and then returning to live in Virginia even though the Virginia courts had treated such marriages as void without a statute. In the same year, for the first time, the penalty imposed on a party to a miscegenetic marriage was made clearly applicable to the Negro spouse. Also, the penalty was enlarged to not less than two nor more than five years in the penitentiary.** Va. Acts of Assembly 1877-1878, ch. VII, § 8 at 302 (now § 20-59).

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* Problems with respect to the definition of racial classifications and to the civil effects of miscegenetic marriages did occur but have no specific relevance here. See Wadlington, 1195-1199.

** The final Virginia statute on this subject passed in 1932 made the crime of interracial marriage a felony but reduced the minimum term of imprisonment to one year. Va. Acts of Assembly 1932, Ch. 78 at 68 (now § 20-59).

Despite the existence of deterrent legislation, interracial sexual relationships continued and increased after the Civil War. Reuter, 141. The rising tide of mulatto offspring and the passing of many of them as whites motivated a tightening of the definition of Negro and enactment of stronger anti-miscegenation legislation. In the slave days, there had been essentially economic motivations for denying Negro slaves the legal right to marry. In fact, as previously indicated, no criminal penalties were imposed on the Negro partner of a miscegenetic marriage until 1878. With the end of slavery, unfortunately, new motivations arose which were purely racist and based on the theory that Negroes and other non-whites are members of inferior races.

Racial Integrity Act of 1924

After World War I, the United States experienced a period of intolerance and racial animosity expressed in the spread of all forms of hate groups and super-patriotic orders with dogmas of "yellow peril", "mongrelization of the white race" and "un-Americanism". In fact, at the time of passage of the Racial Integrity Act of 1924, racists predicted the destruction of the white race if Negro-white miscegenation and the tide of immigrants arriving in the United States each year were not suppressed. Earnest Sevier Cox, in his book entitled WHITE AMERICA (Richmond: White America Society, 1923), posed this alleged threat to America and suggested federally supported colonization and uniform legislation barring the mixing of the races in any form.

White racial superiority, a carry-over in the South from slavery days, formerly had rested primarily on observa-

tions by 19th century scientists and questionable Biblical texts. The authority which the new and popular science of eugenics provided for this concept was eagerly received in Virginia. Originally eugenics had dealt with the breeding of animals and the disclosure of their heredity traits. Race-conscious Americans seized upon immature conclusions of eugenicists and subjected them to an overdose of racial pride embodied in the concept of "Anglo-Saxonism". New Englanders and Southerners alike talked about "mongrelization of the white race" and "race suicide". Racial prejudice increased; "Anglo-Saxon clubs of America" sprang up throughout Virginia and sponsored legislation designed to halt the mixing of the races in Virginia.*

On February 7, 1924, on petition from these organizations, and in response to the racist sentiment of the time, a number of State senators initiated the bill which ultimately became the Racial Integrity Act of 1924, and was originally entitled *"A Bill to Preserve the Integrity of the White Race".*** Members of both houses of the General Assembly displayed a great interest in the bill. The House of Delegates invited John Powell, a renowned Virginia pianist and local racist, to speak before it on the dangers of "racial amalgamation". According to the *Richmond Times Dispatch* of February 18, 1924, the delegates selected Powell because of his knowledge of "ethnological problems and conditions in various parts of the world and

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* *Richmond Times Dispatch*, February 17, 1924, p. 6. At the time of passage of the Racial Integrity Act of 1924, there were Anglo-Saxon clubs in Virginia at the University of Virginia, College of William and Mary, Virginia Military Institute, Washington and Lee College and Randolph Macon College. Clubs could also be found at Richmond and other cities and towns of the State.

** *Journal of the Senate of the Commonwealth of Virginia* (Richmond: Superintendent of Public Printing, 1924), p. 135.

his wide acquaintance among European authorities and statesmen". Powell was very much involved in the national eugenics movement and had, himself, organized many of the Virginia Anglo-Saxon clubs which petitioned the Assembly to take action to preserve the white race. Powell stressed to a "well-filled gallery" the need to preserve the white race from contamination with non-white blood, and observed that when a white race absorbed the Negro through amalgamation its civilization disintegrated. Powell was assisted in his efforts by Dr. W. A. Plecker, the State Registrar of Vital Statistics, who supplied "vital statistics" to show confusion in Virginia concerning racial origins and the necessity for a stronger anti-miscegenation law to preserve racial integrity. *Richmond Times Dispatch,* February 13, 1924, p. 1. In response to Powell's address and the statistics of Dr. Plecker, the House introduced a bill of its own only three days after Powell's address.

Thereafter, apparently without significant debate or controversy between the Senate and the House of Delegates, the Act, technically entitled "An Act to Preserve Racial Integrity" (Va. Acts of Assembly, 1924, ch. 371), passed the Senate on February 27, 1924, and the House on March 8, 1924, and was approved by the Governor on March 20, 1924.

It in part repeated earlier prohibitions on miscegenation but also effected "a sweeping change in the scope of the law . . . by keying the miscegenation provisions to a new and very narrow definition of a 'white person'." Wadlington, 1200. Under this new definition, a white person was forbidden to marry anyone other than another white person defined to be one "who has no trace whatsoever of any

blood other than Caucasian . . . . " (now § 20-54).* For the first time, Virginia prohibited the marriage of whites with Mongoloids and other non-Negro races as well as Negroes. Earnest Sevier Cox, in his book, THE SOUTH'S PART IN MONGRELIZING THE NATION (Richmond: White America Society, 1926), called the Virginia law "probably the most perfected expression of the white racial ideal since the institution of caste in India some four thousand years ago". At p. 98.

Other new provisions of the 1924 legislation which remain in force today remind one of the laws of Nazi Germany: The State Registrar of Vital Statistics was empowered to prepare a form so that persons could certify to their "racial composition" to local registrars who could issue duplicate certificates of racial composition, one for the person registering and one for the State Registrar (now § 20-50). The knowing or willful falsification of a registration certificate as to color or race was made a felony punishable by one year in the penitentiary. A marriage license was not to be issued unless the issuing official had "reasonable assurance" that the statements of the parties as to color were correct, and the Act assigned the burden of proof, if a question should arise, to the persons applying for the license (now § 20-53).

All statutes relating to racial intermarriage which were in effect in 1924 were made applicable to marriages prohibited by the new provisions. Thus the 1924 act carried forward the provision making Negro-white marriages void,

* There was an exception to this definition designed apparently to protect the descendants of John Rolfe and Pocahontas which deemed persons "who have one-sixteenth or less of the blood of the American Indian and no other non-Caucasic blood" to be white persons.

the civil and criminal applicability of the evasion provision [Section 20-58], and the criminal penalties applicable to the parties to an interracial marriage and to the minister performing the ceremony.

III.

Anti-miscegenation laws cause immeasurable social harm.

There is still another history to be told; it lurks beneath the surface of the "written" history we have examined. This is the story of what these laws have done to our entire people. Unhappily this is the familiar chronicle of race relations in our nation. Here briefly is some intimation of what the miscegenation laws—born out of oppression and hatred—contribute to our legacy.

The high degree of racial mixture that exists in the United States—estimates of the ratio of Negro Americans with at least one known white forebear run as high as 72 to 83 per cent, PETTIGREW, A PROFILE OF THE NEGRO AMERICAN 68 (1964)—has occurred predominantly in the South under illicit conditions fostered by the miscegenation laws. Of more relevance, this racial mixing was almost entirely in the context of illicit exploitative sexual intercourse; white male of Negro female. MYRDAL, AN AMERICAN DILEMMA, Chapter 5 especially at pp. 1204-1207 (1962) (Hereafter cited as "Myrdal");* CASH, THE MIND OF THE SOUTH 87-88 (1941).

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* Throughout this section, we often utilize this definitive treatise on the Negro problem in America by the eminent Swedish social economist, Gunnar Myrdal.

This history of illicit sex relationships conditions, psychologically and sociologically, the entire pattern of American race relations. Nor can its importance be overemphasized since "[t]o the ordinary white American the caste line between white and Negro is *based upon,* and *defended by,* the anti-amalgamation doctrine", and "[moreover this] . . . doctrine, *more than anything else,* gives the Negro problem its uniqueness among other problems of lower status groups, not only in terms of the intensity of feeling but more fundamentally in the character of the problem." Myrdal, 54 (our emphasis). This socio-psychological taproot of American racial prejudice is nowhere more vividly described than in Lillian Smith's great work, KILLERS OF THE DREAM, in the chapter entitled "Three Ghost Stories" (1961 ed.), and in W. J. Cash's, THE MIND OF THE SOUTH (1941).

Considering such accounts, it is difficult to avoid Myrdal's conclusion that

> [t]he fixation on the purity of white womanhood, and also part of the intensity of emotion surrounding the whole sphere of segregation and discrimination, are to be understood as the backwashes of the sore conscience on the part of white men for their own or their compeers' relations with, or desires for, Negro women. Myrdal, 591.

The Negro participant in this abnormal sex relationship did not escape psychologically unscathed. Although isolating psychogenic factors is difficult, there can be no doubt of the profound adverse effect racial discrimination has had on the individual personality traits of the Negro. See Pettigrew, *supra* at Chapter I, "The Role and Its Burdens" (1964); cf., *Brown* v. *Board of Education,* 347 U. S. 483

(1954). It is a frightful thing, to use one example, if Miss Smith is right when she claims ". . . there is a burning blasting scorn of white men growing in the minds . . . of nearly every woman of the colored race. . . ." Smith, *supra* at 109. Any social construct which can engender such group hatred and personal antagonism is wrong.

Admitting the futility of attempts to expunge the sins of the past, Virginia's anti-miscegenation laws (and those of sixteen Southern and border States) stand as a present day incarnation of an ancient evil. As such, these laws do not simply bar interracial marriage, they perpetuate and foster illicit exploitative sex relationships. Moreover, these laws are explicitly designed to that end. To fail to understand such invidious purpose is to doom the reasonable man to an unrequited search for logic, viz:

> . . . the relative license of white men to have illicit intercourse with Negro women does not extend to formal marriage. The relevant difference between these two types of relations is that the latter, but not the former, does give social status to the Negro woman and does take status away from the white man. These status concerns . . . are functions of the caste apparatus which, in popular theory, is itself explained as a means of preventing intermarriage, *the whole theory* [thus] *becoming largely a logical circle.* Myrdal, 590 (our emphasis).

The relevance of such purpose to our scope of inquiry here—the present day impact of these laws—seems clear.

Cutting through the psychological overlay and rationalizations, Myrdal explains that:

> . . . The great majority of non-liberal white Southerners utilize the dread of 'intermarriage' . . . to justify discriminations which have quite other and wider goals than the purity of the white race. . . . what white people really want is to keep the Negroes in a lower status. Myrdal, 590-91.

And enlarging on the same theme he adds:

> The persistent preoccupation with sex and marriage in the rationalization of social segregation and discrimination against Negroes is . . . an irrational escape on the part of the whites from voicing an open demand for difference in social status between the two groups for its own sake. *Ibid.*

In short, the basis of harm that makes this Court's warrant equal to the ultimate evil of these laws is that they constitute an infliction of indignity upon every person cast among others as not good enough to marry a "white person".

Paradoxical as it may seem that this most blatant ascription of inferior status is the last to be condemned by this Court, it is fitting that the opportunity to make the condemnation universal presents itself. The miscegenation laws, understood as the paradigm of "all of these thousand and one precepts, etiquettes, taboos, and disabilities inflicted upon the Negro [having the] common purpose: to express the subordinate status of the Negro people and the exalted position of the whites," Myrdal, 66, and func-

tioning chiefly as the State's official symbol of a caste system, must be dealt with accordingly.

IV.

The legislative history of the Fourteenth Amendment does not exempt anti-miscegenation laws from its application.

The only substantive argument advanced by the Commonwealth of Virginia in its Statement opposing the noting of jurisdiction by this Court was that the legislative history of the Fourteenth Amendment conclusively establishes that it was not intended to apply to miscegenation laws. Eclectic statements from the debates on the bill which became the Civil Rights Act of 1866 are used to support this thesis, which was also advanced in the School Segregation Cases, and a law review article, Pittman, *The Fourteenth Amendment: Its Intended Effect on Anti-Miscegenation Laws,* 43 N. C. L. Rev. 92 (1964). (A more recent article in support of the same thesis, which was not cited by the Commonwealth, is Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent,* 52 Va. L. Rev. 1224 (1966).)

A close examination of such statements indicates that many legislators who felt the Civil Rights Act of 1866 was not intended to reach miscegenation laws based their views on the now discredited equal application theory (later enunciated as a judicial construction of the equal protection

clause in *Pace* v. *Alabama*, 106 U. S. 583 (1883)). For example, the Commonwealth quotes Senator Trumbull as follows (at p. 8 of its Statement):

> How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vice versa*? *I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races.* This bill does not interfere with it. If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both. . . . (our emphasis)

But Senator Trumbull's presumption has proven incorrect; equal application of inequalities based on race is unconstitutional. *McLaughlin* v. *Florida*, 379 U. S. 184, 188 (1964).

If such legislative history—whatever its real meaning assuming one could read the minds of the legislators from the historical record—were determinative of the scope of the Fourteenth Amendment, then it might not have been applicable to school segregation, jury service and other forms of segregation. See, *e.g.*, *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); *Norris* v. *Alabama*, 294 U. S. 587 (1935);

Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 64-65 (1956).

A correct appraisal of the legislative history of the broad guarantees of the Fourteenth Amendment for purposes of constitutional adjudication is that they were open-ended and meant to be expounded in light of changing times and circumstances. See Bickel, *supra*, at 64 ("But the relevant point is that the Radical leadership succeeded in obtaining a provision whose effect was left to future determination".); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 145 (Evidence from the debates indicates that Bingham and others "hoped that the prohibitions on racial discrimination would have an open-ended character, *i.e.*, would grow through judicial interpretation and congressional legislation with the progress of time"); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959) (". . . the words [of the equal protection clause] are general and leave room for expanding content as time passes and conditions change"); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722 (1961) ("Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relations which the Amendment was designed to embrace").

In short, the applicability in 1967 of the equal protection and due process clauses to miscegenation laws cannot be ascertained by a resort to doubtful legislative history but must be determined by this Court, utilizing all appropriate means of constitutional adjudication and bearing in mind Chief Justice Hughes' admonition:

> If . . . the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'we must never forget that it is *a constitution* we are expounding' (McCulloch v. Maryland, 4 Wheat. 316, 407) . . . *Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 442-43 (1934).

V.

The Virginia anti-miscegenation laws are racially discriminatory and deny appellants equal protection of the laws.

There can be no doubt that the conviction of the Lovings was because Mrs. Loving is a Negro. But for this fact, and that Richard Loving is a "white person" under Va. Code § 20-54, no crime would have been committed. Except for the difference of color, the state never raised any objection to the marriage. If both had been white or both had been other than white, their marriage would be valid.

In *Brown* v. *Board of Education*, 347 U. S. 483 (1954), this Court struck down segregation in public schools as a violation of equal protection. Whether *Brown* means that (i) the Fourteenth Amendment prohibits the intentional disadvantaging of Negroes as Negroes by any form of legalized segregation (Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421 (1960)) or, (ii) there can be no rational basis for a statutory classification which stamps Negroes as inferior (Applebaum, *Miscegenation*

Statutes: A Constitutional and Social Problem, 53 GEO. L. J. 49, 86 (1965)) as the Virginia anti-miscegenation laws do or, (iii) a state statute cannot constitutionally deny Negroes the freedom to associate with whites (Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 34 (1959)), we agree with Professor Bickel that the principle of the *Brown* case should control the constitutionality of miscegenation laws. BICKEL, THE LEAST DANGEROUS BRANCH 71 (1962).

In fact, miscegenation laws seem more clearly unconstitutional than school segregation since (i) the right of two consenting, competent adults to marry each other seems even more fundamental than the right of students to attend an integrated public school, (ii) there clearly is no equal alternative and (iii) both parties to an interracial marriage wish to associate or join together as man and wife, while in *Brown,* arguably, the white students, or some of them, did not wish to associate with the Negro students.

When a Negro is denied the right, solely because he is a Negro, to marry a white woman who wishes to marry him, the law discriminates against him and denies him as well as the woman equal protection of the laws. While miscegenation laws have been upheld in the past by use of the "equal application" theory of *Pace* v. *Alabama,* that these laws do not discriminate because both whites and Negroes are prohibited from intermarrying (see, *e.g., Jackson* v. *City and County of Denver,* 109 Colo. 196, 124 P. 2d 240 (1942)), this theory " . . . represents a limited view of the Equal Protection clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin* v. *Florida,* 379 U. S. 184, 188 (1964).

Statutory distinctions based on race alone have been struck down in many cases involving rights much less substantial than the right to marry. See, *e.g.*, *Hamm* v. *Virginia State Board of Elections*, 230 F. Supp. 156 (E. D. Va.), *aff'd per curiam*, 379 U. S. 19 (1964) (designation of race in voting and property records); *Anderson* v. *Martin*, 375 U. S. 399 (1964) (designation of race on nomination papers and ballots); *Watson* v. *City of Memphis*, 373 U. S. 526 (1963) (segregation in public parks and playgrounds); *Oyama* v. *California*, 332 U. S. 633 (1948) (racial restriction involving alienation of land); *Takahashi* v. *Fish & Game Commission*, 334 U. S. 410 (1948) (racial restriction on commercial fishing licenses); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886) (racial restriction on licensing of laundries). And this Court has enunciated as the law of the land that:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943).

In fact, "classification based on race alone is inherently discriminatory". *Dorsey* v. *State Athletic Comm.*, 168 F. Supp. 149, 151 (E. D. La. 1958), *aff'd. per curiam*, 359 U. S. 533 (1959).

In *McLaughlin* v. *Florida*, *supra*, this Court held that there must be "some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by the white person and a Negro, but not otherwise",

379 U. S. at 192, and also stated, in effect, that the burden of demonstrating this overriding purpose is on the State because:

> . . . the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect' . . . and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose . . . 379 U. S. at 192.

At least two members of this Court have recognized that there can be no such "overriding statutory purpose" to justify a miscegenation law:

> I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. (Mr. Justice Stewart, joined by Mr. Justice Douglas, concurring in *McLaughlin*, 379 U. S. at 198.)

The Supreme Court of Appeals of Virginia upheld the miscegenation laws in this case (R. 25) by reliance on its earlier decision in *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749 (1955). In *Naim*, the purposes of these laws were set forth as follows:

> We are unable to read in the Fourteenth Amendment to the Constitution, or in any other provision of that great document, any words or any intendment which prohibit the State from enacting legislation to preserve the racial integrity of its citizens, or which denies the power of the State to regulate the marriage

> relation so that it shall not have a mongrel breed of citizens. We find there no requirement that the State shall not legislate to prevent the obliteration of racial pride, but must permit the corruption of blood even though it weaken or destroy the quality of its citizenship. . . . 87 S. E. 2d at 756.

Of course the maintenance of racial purity or integrity is a meretricious basis for these laws for there is no evidence to support the existence of so-called "pure" races. MONTAGU, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE (4th ed. 1964); see authorities discussed in Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes,* 42 CORNELL L. Q. 208, 217 (1957). The idea of a pure race is a subterfuge to cloak ignorance of the phenomenon of racial variation.

Even if racial purity were a constitutionally acceptable purpose, the Virginia laws are not reasonably calculated to effect this purpose. The only race kept "pure" is the Caucasian. This is because the Virginia laws are not designed to preserve the purity of races but, as the original name* of Virginia's 1924 Racial Integrity Act indicates and its legislative history affirms, to preserve only the integrity of one group: members of the so-called "White"** or "Anglo-Saxon Race". A person of Chinese ancestry, for example, is not included within the definition of "colored

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* "A Bill to Preserve the Integrity of the White Race." See p. 21 of this Brief.

** For a persuasive discussion of the fact that there is no white race and never has been one see "A Four-Letter Word That Hurts" by anthropologist, Morton H. Fried, in *Saturday Review,* October 2, 1965.

persons" [Va. Code § 1-14], or "white persons" [Va. Code § 20-54]. Thus the marriage of a Chinese and a "white person" would be unlawful under Va. Code § 20-54, *Naim* v. *Naim*, 197 Va. 80, 87 S. E. 2d 749 (1955). On the other hand, a marriage between a Chinese and a "colored person" would be neither unlawful nor subject to prosecution. Certainly this is not equal protection. In fact, Virginia's concept of "race", based on statutory definitions which are a combination of legal fiction and genetic nonsense, is a social rather than a scientific concept, designed to preserve the social status of Virginia's politically dominant group.

The other articulated legislative purpose is the prevention of "corruption of the blood" from racial intermixing which would "weaken or destroy the quality of its [Virginia's] citizenship". To assume this is a valid legislative purpose—as the highest Virginia court did—which justifies miscegenation laws is not enough to meet the State's burden with respect to laws which on their face discriminate on the basis of race or color. Virginia has not presented, and we submit cannot present, reputable scientific evidence to prove that a person of mixed blood is somehow "inferior" in quality to one of racial purity, assuming *arguendo* that a person of racial purity such as a pure Caucasian exists.* Most serious students of anthropology do not even consider this question a present problem for research, agreeing that the races of the world are essentially equal in native ability and capacity for civilization and that group differences are for the most part cultural and environmental, not heredi-

* Even if reliable scientific evidence could be presented to support an inferior race theory, the State's burden would not be met. The possibility of less superior but healthy progeny of interracial couples would not justify the serious restriction on personal liberty effected by miscegenation laws prohibiting interracial marriages.

tary. See, *e.g.*, THE RACE QUESTION AND MODERN SCIENCE: THE STATEMENT ON THE NATURE OF RACE AND RACE DIFFERENCES, Article 7 (UNESCO, 1952).

As for the progeny of racial intermixing, there is not a single anthropologist teaching at a major university in the United States who subscribes to the theory that Negro-white matings cause biologically deleterious results. See letter to editor from members of Department of Anthropology, Columbia University, *N. Y. Times,* December 15, 1964. On the contrary, some conclude that, because of a certain hybrid vigor, interracial marriage may be desirable and the offspring superior, citing the Hawaiian population, among others, to support this view. See SHAPIRO, RACE MIXTURE (UNESCO, 1965), and the authorities discussed in Cummins & Kane, *Miscegenation, The Constitution and Science,* 38 DICTA 24, 47-49 (1961).

We will not postulate unarticulated legislative purposes.* In the final analysis, these laws are unjustifiable relics of slavery—initially passed to foster that peculiar and distasteful institution, and re-enacted in their present form as part of the surge of racial antagonism and intolerance of the 1920's. They deny Negroes and other nonwhites equal protection of the law and stamp them as inferior citizens.

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* Judge Bazile in his opinion below gave the following religious justification for miscegenation laws which requires no comment:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the raees shows that he did not intend for the races to mix (R. 16).

VI.

The Virginia anti-miscegenation laws violate the due process clause of the Fourteenth Amendment.

Marriage is perhaps the most important and most personal of all human relationships. We think it clear that the "liberty" which is protected by the due process clause of the Fourteenth Amendment includes the right to marry. *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1922) (dictum). Justice Traynor so held in his opinion in *Perez* v. *Sharp,* 32 Cal. 2d 711, 198 P. 2d 17 (1948) (*sub nom. Perez* v. *Lippold*), which invalidated California's anti-miscegenation statute. In *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942), this Court described marriage as "one of the basic civil rights of man". See generally Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem,* 53 Geo. L. J. 49, 67-68 (1964).*

The recent holding in *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), that the privacy of the marital relationship is a constitutionally protected freedom—whether under the rubric of a right of privacy or under the concept of ordered liberty embodied in the due process clause, *Palko* v. *Connecticut,* 302 U. S. 319 (1937)—signifies that the right to marry is itself protected from arbitrary governmental interference by the basic guarantees of our Constitution. Furthermore, the right to marry, regardless of race or color, may appropriately be deemed part of a broader constitutional freedom of association as enun-

* It should be noted that the United States has joined with other members of the General Assembly to vote in the United Nations for the adoption of the Universal Declaration of Human Rights which provides in Article 16.1:

> "Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and to found a family."

ciated in *Griswold* by Mr. Justice Douglas and previously recognized to some extent in *NAACP* v. *Alabama,* 357 U. S. 449 (1958), and *NAACP* v. *Button,* 371 U. S. 415, 430-31 (1963).

Of course the right to marry is not an absolute right and a State may restrict it in certain circumstances, for example, by imposing reasonable age and health limitations and prohibiting incestuous or polygamous marriages. The question, however, as in the equal protection area, is whether the anti-miscegenation statute has a legitimate legislative purpose and whether the manner of regulation bears a reasonable relationship to such purpose. See, *e.g., Nebbia* v. *New York,* 291 U. S. 502, 525 (1934); *Bolling* v. *Sharpe,* 347 U. S. 497, 499-500 (1954) ("Segregation in public education is not reasonably related t any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of due process."); *Buchanan* v. *Warley,* 245 U. S. 60 (1917).

The Virginia anti-miscegenation laws have no legitimate governmental objective. Their enforcement deprives appellants of personal liberty—their right to marry—without due process of law just as it also denies them equal protection of the laws.

CONCLUSION

For the foregoing reasons, Sections 20-58 and 20-59 of the Virginia Code should be held unconstitutional, and this Court should make clear that neither Virginia nor any other State can constitutionally prohibit or penalize interracial marriages.

The elaborate legal structure of segregation has been virtually obliterated with the exception of the miscegena-

tion laws. White racists can still point to these laws to support their appeal to the ultimate superstition fostering racial prejudice—the myth that Negroes are innately inferior to whites. There are no laws more symbolic of the Negro's relegation to second-class citizenship. Whether or not this Court has been wise to avoid this issue in the past, the time has come to strike down these laws; they are legalized racial prejudice, unsupported by reason or morals, and should not exist in a good society.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966.

No. 395.

RICHARD PERRY LOVING, et al.,
Appellants,

v.

COMMONWEALTH OF VIRGINIA.

On Appeal From the Supreme Court of Appeals for Virginia.

BRIEF OF AMICI CURIAE JAPANESE AMERICAN CITIZENS LEAGUE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 395

RICHARD PERRY LOVING AND
MILDRED DELORES JETER LOVING,
Appellants

v.

COMMONWEALTH OF VIRGINIA,
Appellee

ON APPEAL FROM THE SUPREME COURT OF APPEALS
FOR VIRGINIA

BRIEF OF AMICI CURIAE JAPANESE AMERICAN CITIZENS LEAGUE.

INTEREST OF AMICI CURIAE.

According to the 1960 United States census report compiled by the Bureau of the Census, Department of Commerce, there were 1,733 "Japanese" residing in the state of Virginia. The 1960 census report also lists 464,332 Japanese to be residing in the United States of whom 17,911 were residents of the seventeen States which presently maintain anti-miscegenation statutes.[1] And while of these

1. Alabama 500; Arkansas 237; Delaware 152; Florida 1,315; Georgia 885; Kentucky 664; Louisiana 519; Maryland 1,842; Mississippi 178; Missouri 1,473; North Carolina 1,265; Oklahoma 749; South Carolina 460; Tennessee 507; Texas 4,053; Virginia 1,733 and West Virginia 176.

seventeen States, only Georgia's anti-miscegenation statute expressly mentions "Japanese"[2] several other anti-miscegenation statutes employ terms such as "Malay race",[3] "Mongolian",[4] and in Oklahoma[5] and Texas[6] presumably Japanese would be classed as "white persons" although this is by no means clear. Further, as to the remainder of these seventeen States it is similarly unclear as to whether or not a person of Japanese ancestry is a member of the class severally designated as "white person", "Caucasian" or "colored person."

Because of these confusions which peculiarly plague persons of Japanese ancestry and those similarly situated and further as an American organization vitally interested in, and concerned with, the dignity and liberty of all Americans, the Japanese-American Citizens League ("J.A.C.L.") files this brief *amici curiae*. Briefly, the J.A.C.L. is a non-profit, charitable organization with a national membership in excess of 20,000 persons who reside throughout the United States and while its membership is largely comprised of persons of Japanese ancestry, its membership also includes, without limitations, Americans of varied faiths, creed and color.

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2. Georgia Code Annotated, Tit. 53, § 312. "*White person defined.* The term 'white person' shall include only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person, any one of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a colored person or person of color, shall be deemed to be a white person." (Other relevant sections of the Georgia Code are set forth in Appendix A, under "Relevant Portions of State Statutes".)

3. Anno. Code of Maryland, Art. 27, § 398.

4. Mississippi Code Anno., § 459; Vernon's Anno. Missouri Stat. § 451.020.

5. Oklahoma Constitution, Art. 23, § 11.

6. Vernon's Texas Penal Code, Art. 493.

SUMMARY OF ARGUMENT.

I.

Since *Pace v Alabama,* 106 US 583 (1882) the rights, privileges and immunities of the individual in many facets and spheres of his life have, under the Fourteenth Amendment, been safeguarded to him, free of the odious circumscription of laws based on race. Vital and all-important as these rights are to the individual and to the preservation of a democratic society of free men, such rights appear as palpable and material ones in contrast to the intimate, personal right of privacy in marriage: *Griswold v Connecticut,* 381 US 479. Freedom in marriage concerns one of the most basic and fundamental rights of the individual, rooted, indeed, in one of man's biological drives. The mutual exercise by two individuals of such a right,—a noble goal otherwise promoted and blessed by society,—should not be converted into a crime or otherwise stigmatized by law merely because of race.

It would constitute a shocking outrage if the anti-miscegenation laws of Virginia (and the other sixteen States) directed that its citizens must marry a person of a *different* race. That this same operative principle is geared to operate in the other direction by the anti-miscegenation statutes makes it no less demeaning to the citizen and an invidious invasion of a basic, fundamental right.

Rather, the freedom of choice,—the freedom of choice *not* to marry a person of another race as well as the freedom to marry another without regard to race,—should and must reside with the individual, not with the government.

Pace v Alabama, supra, is not authority for sustaining anti-miscegenation laws: First, the "limited view [of *Pace*] of the Equal Protection Clause has not withstood analysis in the subsequent decisions of this Court": *McLaughlin v Florida,* 379 US 184, 188. Secondly, it is respectfully but firmly submitted that the narrow view expressed in *Pace*

was inherently faulty and misleading. What *Pace* failed to consider was whether or not "the same punishment to both offenders, the white and the black" (106 US at 207), would have been meted out if there had been two males, one white and the other Negro, who had been guilty of *identical acts* of "adultery and fornication" with the *same female* (white or "black"); it is clear that the punishment would differ and differ solely because of race. The same inequities would apply with even more gross injustice in the enforcement of anti-miscegenation laws, for miscegenous couples would be punished for engaging in an act, i.e. marriage, which is not only otherwise legal but which also is actually otherwise encouraged and blessed by the state.

II.

Where the exercise of state police power "trenches upon the constitutionally protected freedom from invidious discrimination based on race" such "bears a heavy burden of justification. . . .": *McLaughlin v Florida*, 379 US 184, 196. Virginia's state policy in support of its anti-miscegenation laws has been expressed in terms of maintaining "purity of public morals", "the preservation of racial integrity" and to prevent a "mongrel breed of citizens" as well as "obliteration of racial pride." Even assuming *arguendo* such objectives to be valid state interests (and within this racist context we cannot accept such assumption), since all races *other than white* remain free to intermarry with one another and thereby destroy *their* racial "purity", "integrity" and "pride", the insidious sophism of Virginia's state policy, as well as those of the other sixteen states with anti-miscegenation laws, is readily exposed as a racist, "white supremacy" law which is repugnant "to a free people whose institutions are founded upon the doctrine of equality": *Hirabayashi v United States*, 320 US 81, 100.

III.

Anti-miscegenation statutes have grown out of fundamental misconceptions of fact and serve no public purpose. The use of racial classification as a basis upon which to regulate the actions of individuals must be immediately suspect because such classifications are necessarily arbitrary and incapable of precise application. The stated purpose of the anti-miscegenation laws is to preserve pure races which the legislators thought were separate and distinct entities, but this is clearly not so and there is no such thing as a pure race. The underlying purpose is to preserve racial superiority—of the white race only—but there is no proof that the white race is superior. Moreover, the entire concept of a "master race" is repugnant to our society. When the fictitious foundations of these laws have been dispelled, the only remaining purpose is to preserve differences, such as skin color, nose size or hair types, which are clearly not valid bases of legislation. Finally, the laws must fall because they contain standards of proof which are impossible of application and are unconstitutionally vague. Such statutes, the surviving vestige of an era of exploitation and ignorance, cannot be tolerated.

ARGUMENT.

I.

It Is Respectfully But Firmly Urged That *Pace v Alabama*, 106 US 583, Should Be Overruled Not Only Because the Reasoning in That Early Case Is Inconsistent With Subsequent Decisions of This Court But Also Because the Reasoning in That Case Was and Is Inherently Fallacious.

(A) The Reasoning of *Pace v Alabama* Is Inconsistent With the Subsequent Decisions of This Court and Such Reasoning Should No Longer Be Given Any Currency.

Since 1882, almost 85 years ago, when an Alabama criminal statute founded solely upon race was upheld in *Pace v Alabama*, 106 US 583, on the reasoning that it applied "the same punishment to both offenders, the white and the black", this Court has over the years repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality". *Hirabayashi v United States*, 320 US 81, 100. The torchlight of the Constitution has been wielded to expose and burn away these remaining shackles to individual liberty and to cast forth light extending "to the full range of conduct which the individual is free to pursue, and [which] cannot be restricted except for a proper governmental objective." *Bolling v Sharpe*, 347 US 497, 499-500. And so it was that various rights of citizens and residents of this land have been reaffirmed and upheld, including the right to follow an occupation without discriminatory harassment or restrictions on account of race;[7] to freely enter into contracts[8]

7. *Yick Wo v Hopkins*, 118 US 356; *Truax v Raich*, 239 US 33; *Takahashi v Fish and Game Commission*, 334 US 410; *Steele v Louisville & Nashville RR Co.*, 323 US 192; *Colorado Anti-Discrimination Commission v Continental Air Lines*, 372 US 714.

8. *Adkins v Children's Hospital*, 261 US 525; *Holden v Hardy*, 169 US 366; *Allgeyer v Louisiana*, 165 US 578.

and to own land;[9] to learn foreign languages[10] or to maintain business records in a foreign language;[11] to receive schooling without regard to race,[12] without procrastination by purported spectres of racial violence[13] and free of schemes to perpetuate racial segregation;[14] to freely engage in inter-racial sports[15] and to attend public events on a non-segregated basis[16] as well as to have equal access to public facilities without regard to race;[17] to register to vote[18] and cast ballots unhampered by racial gerrymandering schemes[19] using ballots free of racial designations of candidates;[20] to travel freely from State to State[21] on non-segregated transportation facilities;[22] to have freedom of

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9. *Oyama v California*, 332 US 633.

10. *Meyer v Nebraska*, 262 US 390.

11. *Yu Cong Eng v Trinidad*, 271 US 500.

12. *Brown v Board of Education*, 347 US 483.

13. *Cooper v Aaron*, 358 US 1.

14. *Goss v Board of Education*, 373 US 683.

15. *State Athletic Commission v Dorsey*, 359 US 533, affirming 168 F. Supp. 149 (E.D. La. 1958).

16. *Schiro v Bynum*, 375 US 395, affirming 219 F. Supp. 204 (E.D. La. 1963).

17. *New Orleans v Barthe*, 376 US 189 (public parks and playground), affirming 219 F. Supp. 788 (E.D. La. 1963); *Evans v Newton*, 382 US 296 (public park, title to which had been transferred to individual trustees); *Wright v Georgia*, 373 US 284 (public playground); *Burton v Wilmington Parking Authority*, 365 US 715 (restaurant in parking facilities leased from municipality); *Turner v Memphis*, 369 US 350; *Katzenbach v McClung*, 379 US 294 (public restaurant); *Johnson v Virginia*, 373 US 61 (seating in courtroom); *Atlanta Motel v United States*, 379 US 241 (public accommodations).

18. *Louisiana v United States*, 380 US 145; *South Carolina v Katzenbach*, 383 US 301.

19. *Gomillion v Lightfoot*, 364 US 399.

20. *Anderson v Martin*, 375 US 399.

21. *Edwards v California*, 314 US 160; *United States v Guest*, — US —, 16 L ed 2d 239.

22. *Taylor v Louisiana*, 370 US 154; *Bailey v Patterson*, 369 US 31; *Morgan v Virginia*, 328 US 373.

association unfettered by the taxing power;[23] and to have the security of "protection of equal laws"[24] so that criminal penalties are not imposed upon persons for certain acts merely because the actors happen to be of differing races.[25]

These are but some of the rights and protections safeguarded to the individual. "The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelly v Kraemer*, 334 US 1, 22. Now the question before the Court is whether the vitally personal "right of the individual . . . to marry . . . to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men", *Meyer v Nebraska*, 262 US 390, 399-400[26] may be circumscribed by racial classifications or whether such classification constitutes "an invidious discrimination forbidden by the Equal Protection Clause". *McLaughlin v Florida*, 379 US 184, 192-193. It involves "one of the basic civil rights

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23. *Bates v Little Rock*, 361 US 516.

24. *Yick Wo v Hopkins*, 118 US 356; "The equal protection of the laws is 'a pledge of the protection of equal laws'". *Missouri ex rel Gaines v Canada*, 305 US 337, 350.

25. *McLaughlin v Florida*, 379 US 184.

26. *Meyer v Nebraska*, 262 US 390, 399-400: "While this court has not attempted to define with exactness the liberty thus guaranteed, the term ["No state . . . shall deprive any person of life, liberty, or property without due process of law"] has received much consideration, and some of the included things have been definitely stated. *Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual* to acquire useful knowledge, *to marry*, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally *to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.* [Cases cited] *The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest*, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." Emphasis added.

of man": "Marriage and procreation are fundamental to the very existence and survival of the race." *Skinner v Oklahoma,* 316 US 535, 541.

So personal is the exercise of this basic right of two individuals mutually selecting one another as their respective life partners in marriage,[27] and so intertwined is that choice with the fundamental concept of "life, liberty and the pursuit of happiness", that even under the now-rejected "separate but equal" doctrine of *Plessy v Ferguson,* 163 US 537, such right could not be abrogated by an edict directing an individual to seek a different mate who is just as "equal". For example, if his mutual selection involved one of two identical twins, no power, no statute, no edict could, or should, direct him to shift his choice even to the other "equal" identical twin. This is the nature of the basic fundamental right presently before this Court.[28]

In *McLaughlin v Florida, supra,* even though the Florida statutory prohibition involved "concepts of sexual decency . . . dealing . . . with extramarital and premarital promiscuity", *supra* at 193, yet because such statute was formulated on racial classification and laid "an unequal hand on those who . . . committed intrinsically the same quality of offense", *supra* at 194, this Court struck down such statutory provision as "invidious official discrimination based on race." *Supra* at 196. On the other hand, in the instant case of the appellants before this Court, the state statute of Virginia seeks, not to deter sexual promis-

27. *Griswold v Connecticut,* 381 US 479, 491: "To hold that a right so basic and fundamental and so deep rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments . . . or elsewhere in the Constitution would violate the Ninth Amendment . . ."

28. Cf *Perez v Lippold,* 32 Cal. 2d 711, 714, 198 P. 2d 17, 18-19 (1948); "Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means."

cuity or such similar opprobrious activity but rather the noble and necessary goal common to all persons—"[m]arriage and procreation [which] are fundamental to the very existence and survival of the race." *Skinner v Oklahoma*, 316 US 535, 541. If racial classification may not be imposed in a purported effort to curb sexual promiscuity then clearly racial classifications ought not be imposed to curb a person's noble aspiration of marriage.

(B) The Exercise or Imposition of Governmental Laws or Power Based Upon Race Has No Proper Place in Controlling, or Seeking to Control, the Fundamental, Basic and Highly Personal Right of Marriage.

Racial classification as a standard has no proper place in governmental action invading and seeking to dictate and regulate one of the most basic and intimate areas of a citizen's life, rising, indeed, even above many fundamental liberties in that the exercise of such right by the individual also involves one of man's basic biological drives.

The anti-miscegenation laws of Virginia and of the other sixteen states attempt to use race as a standard for determining and controlling, under the threat of various criminal sanctions as well as civil consequences, whom an individual may or may not marry. The nature and extent of this infringement upon the individual's vital right to choose his, or her, life mate in marriage may be exposed by applying the operative racial principle in reverse: it would be a shocking outrage if the state marriage laws directed that all its citizens must marry a person of a *different* race. That this same operative racial principle is geared in the other direction by the anti-miscegenation statutes makes it no less a shocking outrage which is demeaning to the citizen.

Rather, the freedom of choice,—the freedom of choice *not* to marry a person of another race as well as the freedom

to marry another without regard to race,—should and must reside with the individual, not with the government.

(C) The Reasoning in *Pace* Was and Is Inherently Misleading and Thereby Faulty.

Appellee, the Commonwealth of Virginia, would seek to sustain its racial laws on the eroded foundation of *Pace v Alabama*, 106 US 583, a foundation which this Court has viewed as not having "withstood analysis in the subsequent decisions of this Court." *McLaughlin v Florida*, 379 US 184, 188. It is respectfully but firmly submitted that not only did *Pace* narrowly view the Equal Protection Clause but also that its reasoning was inherently misleading.

Pace narrowly viewed an act involving a Negro male and a white female and concluded that the equal protection requirements were satisfied because the Alabama criminal statute imposed "the same punishment to both offenders, the white and the black." *Supra* at 207. What *Pace* failed to consider, however, was whether or not the same punishment would have been meted out to a white male who also may have been engaged, or could have been engaged in the *same act* with the *same white female*. Thus if two males,—one white and the other Negro,—had each been guilty of "adultery and fornication" with the same white female (or with the same Negro female), the punishment for the very same offense would differ and differ only because of race. A similar disparity would apply to the female in each particular instance.

This very same inequitable principle is given operative effect under the anti-miscegenation laws but with even greater injustice. For example, if two "white persons" enter into the marital status, such is not only not a crime but is indeed blessed by the state; however, if this couple be divorced and thereafter the ex-husband (or the ex-wife) should again enter into the very same status, i.e. marriage, but this time with a person who happens to be non-white,

now this otherwise blessed matrimonial state is converted into a *crime*—and solely on account of race, nothing else.

The attenuated doctrine of *Pace*, including its progeny of anti-miscegenation laws, should no longer be allowed currency among "free people whose institutions are founded upon the doctrine of equality": *Hirabayashi v United States*, 320 US 81, 100. *Pace* should be expressly overruled and the anti-miscegenation laws, in particular that of Virginia's, should be struck down as an affront to the dignity of all citizenry of our society.

II.

Virginia's Anti-Miscegenation Laws, as Well as Such Laws in the Remaining Sixteen States With Anti-Miscegenation Statutes, Violate the Right to "Equal Protection of the Laws" Not Only as to Its Non-White Citizens But Also as to Its White Citizens.

Assuming that "races" can be defined,—and as discussed hereinbelow, any classification is arbitrary,—Virginia's anti-miscegenation statutes[29] further run afoul of the Equal Protection Clause. Its statute declares that it shall be "unlawful for any white person in this State to marry save a white person or a person with no other admixture of blood than white and American Indian"[30] and also declares that "All marriages between a white person and a

29. Virginia Code § 20-50 *et seq.*, set forth under "Relevant Portions of State Statutes."

30. Virginia Code § 20-54: "It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

colored person [31] shall be absolutely void without any decree of divorce or other legal process." [32]

When the state exercises its police power, and, as here, "trenches upon the constitutionally protected freedom from invidious official discrimination based on race", then, "[s]uch a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . and will be upheld only if it is necesary . . . to the accomplishment of a permissible state policy." *McLaughlin v Florida*, 379 US 184, 196. Virginia's "state policy" for its anti-miscegenation statutes has been expressed in terms of maintaining "purity of public morals", [33] "the preservation of racial integrity," [34] and, more recently, to prevent "a mongrel breed of citizens" as well as "obliteration of racial pride." [35] Accepting *arguendo* at face value the "state policy" of Virginia as so expressed, it is readily apparent that the only "purity", the only "racial integrity", the only avoidance of alleged mongrelization of the race are for *whites only* and *none other*, for under Virginia's laws, *all other races* are free to intermarry and thereby "despoil" one another without similar statutory safeguards for preservation of *their* "racial integrity" and "purity" and "pride". An example of more *un*equal protection of the laws can hardly be summoned.

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31. The purported, and circuitous, definition of "colored persons" is set forth in a separate section of the Virginia Code, § 1-14, as follows: "Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; except that the members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians."

32. Virginia Code § 20-57.

33. *Kinney v The Commonwealth*, 71 Va. 858, 869 (1878).

34. *Wood v Commonwealth*, 159 Va. 963, 965; 166 SE 477 (1932).

35. *Naim v Naim*, 197 Va. 80, 90; 87 SE 2d 749, 755 (1955).

However, we do not for a moment suggest that the answer is to extend this racist principle,—for divested of its sophistry it is readily exposed as such,—to other races and thereby further compound this antithesis to the establishment and maintenance of a democratic society of free men.

In addition to denying the equal protection of the laws *inter*-racially, Virginia's anti-miscegenation laws also operate to deny equal protection of the laws to its citizens *intra*-racially. This comes about because Virginia's prohibition against entering into miscegenous marriages applies to a "white person *in this State*"[36] and to its residents who "shall go *out of this State*, for the purpose of being married. . . ."[37] Thus, should a non-resident interracial married couple move into Virginia and there establish a domicile then that particular interracial couple would enjoy rights and privileges which are denied to their respective counterpart citizens who are indigenous to Virginia, namely the right to marry and cohabit as man and wife without regard to racial differences.[38]

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36. Virginia Code, § 20-54. Emphasis added.

37. Virginia Code § 20-58. Emphasis added.

38. Of the remaining sixteen states with anti-miscegenation laws, the following four states appear to recognize the civil validity of interracial marriages by out-of-state non-residents:

Delaware, *Anon. v Anon.*, 46 Del. 458, 85 A.2d 706 (1951).

Kentucky, Revised Statutes, § 402.040: "If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized."

Missouri, *Johnson v Johnson's Adm'r*, 30 Mo. 72 (1860); Op. Att'y Gen. No. 87, Hamilton 10-16-62.

North Carolina, *State v Ross*, 76 N.C. 242, 22 Am. Rep. 678 (1877).

The following eight states would refuse to recognize miscegenous marriages of couples who moved into these states regardless of the validity of such marriage where contracted:

Alabama, *Osoinach v Watkins*, 235 Ala. 564, 180 So. 577 (1938).

Arkansas would appear to deny recognition to out-of-state marriages of non-residents who move into Arkansas. Ark. Stat.

However, should Virginia's laws be construed and applied to bar non-resident interracial couples from coming into or residing in Virginia[39] such would violate the privileges and immunities clause of the Fourteenth Amendment.[40]

Anno., § 55-104: "All marriages of white persons with negroes and mulattoes are declared to be illegal and void." At the very least, such couples would be subject to the penalty of "concubinage" which is defined in § 41-807 as "The living together or cohabitation of persons of the Caucasian and of the negro race. . . ."

Florida, *Whittington v McCaskill,* 65 Fla. 162, 61 So. 236 (1913).

Georgia, *State v Tutty,* 41 Fed. 753 (Cir. Ct., S.D., Ga. 1890).

Louisiana, 1948—50 Op. Att'y Gen. 248.

Maryland, *Jackson v Jackson,* 82 Md. 17, 33 A. 317 (1895), *dictum.*

Mississippi, *Miller v Lucks,* 203 Miss. 824, 36 So. 2d 140 (1948).

Oklahoma, *Stevens v United States,* 146 F.2d 120 (CCA 10, 1944); *Baker v Carter,* 180 Okla. 71, 68 P.2d 85 (1937).

The remaining four states,—South Carolina, Tennessee, Texas and West Virginia,—remain unsettled as to the civil effect to be given to a miscegenous marriage validly entered into by non-residents in another state. However, in Tennessee and Texas such miscegenous couples would be subject to criminal penalties for illegal cohabitation. Tenn. Code Anno. § 36-402: "The intermarriage of white persons with negroes, mulattoes, or persons of mixed blood descended from a negro, to the third generation inclusive, or their living together as man and wife in this state is prohibited." Vernon's Texas Penal Code, Art. 492: "If any white person and negro shall knowingly intermarry with each other in this State, or having so intermarried in or out of the State shall continue to live together as man and wife within this State, they shall be confined in the penitentiary not less than two nor more than five years."

39. Va. Code § 20-57. "All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." As indicated in footnote 38, *supra,* of the seventeen states only four would recognize an out-of-state interracial marriage of parties who move into their states. In the remaining twelve states such marriages would be invalid in eight states and highly questionable in the last four states.

40. "The right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities

Aside from the question of vagueness arising from statutes, courts and juries seeking to do what anthropologists with their scientific expertise have difficulty doing, namely, attempt to formulate and classify races of mankind, there also exist insidious uncertainties as well as confusion in these anti-miscegenation laws. For further example, under Virginia's penal provision § 20-59 criminality applies only to intermarriages of a "white person" and a "colored person" and § 1-14 defines a "colored person" as any person "in whom there is ascertainable any Negro blood." Thus, if a "white person" and a Japanese married while such would be unlawful under § 20-54, under the penal provisions of § 20-59 only the "white person" would be subject to criminal sanctions and the Japanese, being neither a "white person" nor a "colored person" presumably would, on the face of things, incur no criminal penalties. But this is far from being clear by reason of the last sentence of § 20-54 which reads:

> "All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

Thus, by this catch-all provision, an unsuspecting Japanese, as well as any other person similarly situated, might suddenly find himself swept into the web of those particularized provisions which, by their very specificity, appear to exclude Japanese.

The anti-miscegenation laws of the other sixteen states are similarly fraught with inconsistencies and injustices

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clause of the Fourteenth Amendment against state interference. Mr. Justice Moody in *Twining v New Jersey*, 211 US 78, 97 . . . stated, 'Privileges and immunities of citizens of the United States . . . are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States.' And he went on to state that one of these rights of *national* citizenship was 'the right to pass freely from State to State.'" Justice Douglas (concurring opinion) *Edwards v California*, 314 US 160, 178.

and some of these are referred to under "comments" of the *amici curiae* in the Appendix of the "Relevant Portions of State Statutes".

III.*

Anti-Miscegenation Statutes Are Based on Fundamental Misconceptions of Fact Which Render Them Unconstitutionally Arbitrary and Vague and Which Bear No Relationship to Any Legitimate Legislative Purpose.

(A) Racial Classification Necessarily Requires Arbitrary Selection of Population Groups and Its Use for Purposes of Legislation Must Be Highly Suspect.

> "The scientific study of human races is at least two centuries old. There are nevertheless few natural phenomena, and probably no other aspect of human nature, the investigation of which has so often floundered in confusion and misunderstanding." [41]

Although anti-miscegenation laws were enacted during the height of the confusion and misunderstanding about the concept of race, even upon today's understanding, race is a tremendously difficult subject involving arbitrary classifications which are not fit categories for legislation.

It is now generally agreed that Man, the genus *Homo*, is represented by a single species to which all living races belong. Species are groups of inbreeding natural populations, reproductively isolated from other such groups. "Reproductive isolation" does not refer to spatial or geo-

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* Some of the bibliographical source material concerning the theoretical aspects of race used in this section were suggested by S. H. Katz, Department of Anthropology, University of Pennsylvania and L. Van Horn, Department of Anthropology, Hunter College, New York.

41. Dobzhansky, *Mankind Evolving*, 253 (1962).

graphical isolation, but rather to *inability* to mate with other species to produce fertile progeny. A species, therefore, is a genetically closed system, since new genes, the biological units of inheritance, cannot be obtained from other groups and passed on through fertile hybrids. Thus, the species is the basic group for biological and anthropological classification.[42]

Between the individual organism—which is the basic unit of the species—and the species itself, is another layer of classification known as race. Racial classification is a classification based on population groups within the species, which because of social or geographical boundaries, have tended to inbreed among themselves over long periods of time. As a result of this endogamy, they tend to express certain similar physical and genetic characteristics.[43]

The process of classification has recently been described in this manner:

> "A race of *Homo sapiens* is a Mendelian population, a reproductive community of individuals sharing a common gene pool. The level at which the reproductive community is defined depends upon the problem one is interested in investigating. There is no absolute, final or 'true' level at which these reproductive communities are defined. All members of our species belong to one Mendelian population, and its name is *Homo sapiens*. This large species-wide Mendelian population may be divided into smaller Mendelian populations, for all practical purposes an infinitely large number of them . . . Races are open genetic systems, and as such they are quite different from species." [44]

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42. See generally: Simpson, *Principles of Animal Taxonomy* 18, 148-152 (1961); Dobzhansky, *op. cit.* (1962).

43. See Johnston, *The Population Approach to Human Variation*, 134 Annals of the New York Academy of Sciences (Feb. 28, 1966), pp. 507-515.

44. Beuttner-Janusch, Book Review, American Journal of Physical Anthropology, 25:2, September, 1966, p. 184.

The practical truth of the statement that races are infinite is shown by Garn and Coon in an article "On the Number of Races of Mankind."[45] Differing classificatory systems have listed as few as two races and as many as two hundred. The difference depends upon whether the classifier is a "lumper," who groups a number of varieties into one broad category because the differences are too trivial to warrant special classification, or a "splitter," who believes that any distinct variety merits attention.[46] The problem usually resolves itself into the classification of a few geographical races, or many local or microgeographical races.

A geographical race may be defined as "a collection of similar populations inhabiting a broad continental area or island chain."[1] A local race is a more neatly circumscribed physically or socially isolated inbreeding population group. If the classifier uses the geographical races, then the number is "approximately six or seven." If the classifier uses local races, the number is "upwards of thirty."[47] In other words, even at the level of greatest generalization, the number is only an approximation.[48] Geographical races, as used in the Virginia statute, are merely "collections of convenience."[49]

Moreover, when an individual leaves his population group and mates with an individual in another group, the racial classification of the offspring is immediately put in question. When miscegenation—which within the last five

45. 57 American Anthropologist 996 (1955).

46. Garn, *Human Races,* 12 (1961).

47. Garn & Coon, *op. cit.* 999.

48. The Virginia statute appears to be based on geographical races when it uses the terms Caucasian, Negro, Mongolian, American Indian, Asiatic Indian and Malay as the basis for its certificates of racial composition in § 20-50. But there is, of course, no agreement on the precise number of geographical races or of the peoples included within them. See classifications noted in Comas, *Manual of Physical Anthropology,* 1960, pp. 18-19; 303-309, and Dobzhansky, *op. cit.* pp. 262-265.

49. Garn and Coon, *op. cit.* 1000.

centuries has risen to rates unprecedented in human history —becomes wide-spread, the arbitrary "classifications of convenience" become even more blurred. And yet these are the standards which have been enacted into law as the basis upon which citizens of Virginia can be imprisoned for up to five years. Such statutes must be immediately suspect.

(B) Statutes Based on Racial Discrimination Serve No Public Purpose and Are Therefore Invalid.

[1] *Racial Purity Can Not Be Preserved Because Racial Purity Does Not Exist.*

The stated purpose of the present Virginia statute is "the preservation of racial integrity."[50] A similar statute was upheld in Missouri as a valid attempt to preserve "the purity of African blood" (although it contained no prohibition against Negro-Japanese or other Negro-non-white marriages).[51]

From an understanding of the concept of race as the classification of generally endogomous population groups separated only by geographical and/or social barriers, it necessarily follows, however, that there is no such thing as a "pure race". Anthropologists are unanimous in their conclusion that pure races do not now exist and never have.

> "The idea of a pure race is not even a legitimate abstraction; it is a subterfuge used to cloak one's ignorance of the phenomenon of racial variation."[52]

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50. The legislative history of the Virginia statutes (see Appellants' Brief) illustrates that the original anti-miscegenation laws were based in part on the premise that the races must be kept separate for political, social and economic reasons associated with slavery. The concept of such separation enforced by law is now so repugnant to our legal system that it need not be discussed.

51. *State v Jackson*, 80 Mo. 175 (1883).

52. Dobzhansky, "The Race Concept in Biology", The Scientific Monthly, LII (Feb., 1941), pp. 161-165; see also citations collected in Weinberger, "A Reappraisal of the Constitutionality of Miscegenation Statutes", 42 Cornell L.Q. 208 (1957).

The geographical and social barriers which separate races are not absolute and there has always been intermixture of the groups. By this logic, as soon as there was a single hybrid offspring, the race was no longer pure. Enough population movement has been known to our species to make it clear that such miscegenation has not been an isolated or rare phenomenon. A statute intended to preserve the non-existent purity of an arbitrarily selected class cannot stand.

[2] *Preservation of Racial Superiority Is Neither a Meaningful Nor Legitimate Statutory Purpose.*

(a) *The Myth of Racial Superiority Developed Along With the Original Misconceptions of Race.*

When Europeans launched the great Age of Exploration, 500 years ago, they began to come into contact with peoples never before seen, or known only through fragmentary reports of brief contacts. The physical differences between the European and the American "Indian", the African Negro and the Asian were obvious and provided the means of classifying races as separate and distinct peoples. More important this phenomenon led to the association of these physical differences with behavioral and cultural differences, and to the assumption that these differences resulted from "inferiority."[53]

> "When the European encounters a barefooted native wearing bizarre clothing, or watches one eating in an apparently unmannerly fashion, or observes some, to him, superstitious or meaningless ritual, he sees these departures from his own standards of behavior not simply as cultural differences, but as indications of

53. See Montagu, *The Idea of Race*, 9-10 (1965); Shapiro, *Race Mixture*, 7-12 (Third Printing, 1965).

> inferiority. It is a subtle thing which the traveler rarely escapes. Even where the conventions and trappings of a foreign culture are impressive in their complexity, this strangeness often lends them an air of unreality, of *opera bouffe*, that in the end renders them somewhat childlike, if not ridiculous."[54]

The feeling of superiority in the beholder is a common reaction—not limited to Europeans. The travel literature of the Chinese, for example, is also filled with similar judgments.[55] But it was the European view of superiority which was enacted into law.

The Europeans' natural feeling of superiority was confirmed as a result of the slave trade which brought to their midst the African Negro, obviously different from the white man and "obviously inferior" to his white captors. It was sustained and further buttressed with the popularization of Darwin's theories of evolution, which were indiscriminately and improperly applied to prove that the "white" race was superior to all others, having reached the pinnacle of evolution.[56]

In his seminal work "On The Origin of the Species" first published in 1859, Darwin had shown how species—not races—had evolved over time by a long process of natural selection which resulted in the "survival of the fittest". His doctrine was solely biological. It had no application to cultures and yet its phraseology lent itself readily to use by the "social Darwinists," who applied the theories of biological evolution to explain cultural difference. Combined with the earlier concept of a "scale of nature," a ladder on which each group had its rank, it provided

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54. Shapiro, *op. cit.* 28.

55. Shapiro, *op. cit.* 28; see also; Hulse, *The Human Species,* 376 (1963), "The names by which the people of a preliterate tribe call themselves, as distinct from everybody else, can very often be translated as *men,* or *real men.*"

56. See generally Eiseley, *Darwin's Century,* especially pp. 297, *et seq.* (1958).

"scientific logic" with which racists could explain the natural and eternal superiority of the white man and justify the separation of the races. Although the theory was widely believed,[57] it had no justification. None of the concepts of racial superiority has survived scientific investigation.

(b) *There Is No Basis for Equating Race and Cultural Potential.*

Cultural activities are man's way of reacting to his environment and there is no evidence of a connection between "race" and cultural or intellectual potential.

> "The evolutionary facts indicate that the mental capacities of human beings in different populations called 'races' are so much alike that for all practical purposes we can assume that given adequate opportunities, the members of any one group could, with the same or similar frequencies, achieve whatever the members of any other group with the adequate opportunities have achieved. Wherever it has been possible to put this

57. A Georgia court upheld anti-miscegenation statutes on the ground that: "[moral and social] equality does not exist and never can. The God of nature made it otherwise, and no human law can produce it and no human tribunal can enforce it. There are gradations and classes throughout the universe. From the tallest archangel in Heaven, down to the meanest reptile on earth, moral and social inequalities exist and must continue to exist through all eternity." *Scott v Georgia,* 39 Ga. 321, 326 (1869).

A Missouri court upheld a statute on the ground that: "It is stated as a well authenticated fact that if the issue of a black man and a white woman and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites . . ." *State v Jackson,* 80 Mo. 175, 179 (1883).

This quotation is significant not because it now appears so ludicrous but because it suggests that only 80 years ago it was thought that Negroes and whites were different species incapable of intermarrying to create fertile progeny!

For convincing evidence that the Virginia statutes were enacted to preserve the superiority of the white race—and the white race only—see Appellants' Brief.

hypothesis to the test, it has been supported by the findings."[58]

The belief "that physical and mental traits are linked, that the physical differences are associated with rather pronounced differences in mental capacities, and that these differences are measurable by IQ tests and the cultural achievements" of populations is what Montagu calls "the myth" of race.[59]

(c) *There Is No Basis for the Belief in Biological Superiority.*

Although racial classifications may reflect some observable physical differences within mankind, "they do so in an artificial and even misleading manner. They tend to give the impression that the human species is naturally partitioned into discrete, discontinuous groups, whereas in studying the geographical distribution of physical characters, we commonly find gradual changes as we pass from one region to another rather than sharp boundaries and abrupt transitions."[60]

The fact of the matter is that "all peoples of the earth are infinitely more alike than they are different."[61] The differences are ones of degree and not of kind.

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58. Montagu, *The Idea of Race*, 62 (1965).

59. Montagu, *Man's Most Dangerous Myth: The Fallacy of Race*, 24 (4th Edition, 1964); See also Garn, *Human Races*, 111 (1961): "There is no evidence for racial differences in character and temperament, other than those due to cultural conditioning."; Stern, *Human Genetics*, 701 (1960): "It is difficult enough to define an over-all social psychology, but even when some valid approximation can be made, it seems to apply only to specific historical periods, or, if the race occupies different parts of the globe, only to specific regions. Differences in group psychology are also well known in different social layers of populations presumably rather genetically homogeneous."

60. Harrison, Weiner, Tanner and Barnicot, *Human Biology*, 191 (1964).

61. Krogman, *Physical Anthropology and Race Relations: A Biosocial Evaluation*, The Scientific Monthly, LXVI, No. 4, April, 1948, p. 317.

No race has a monopoly on any single trait or group of traits. They all include individuals running a scale from short to tall, broad to narrow and light to dark. The differentiation of races by morphological characteristics, therefore, becomes a statistical problem of determining differences in group averages. Having determined the averages, however, nothing necessarily follows about the specific characteristics of individuals within the race.

Herskovits illustrates this fact with the following example.

> "It is a commonplace that the noses of Europeans are narrow, those of Africans broad. Among the broadest-nosed Negroes are the Kajji of the Niger Delta of West Africa; among the Caucasoids with narrowest nostrils are the Swedes. If we set down the average values of this measurement for these two populations, a striking difference between them is to be seen:
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> | | |
> |---|---|
> | 55 Kajji | 45.5 mm. |
> | 260 Swedes | 30.2 mm. |
>
> Yet when we take into account the variability of these two populations in this trait, we see that even such a marked difference in nose form does not prevent *some* Swedes from having broader nostrils than *some Negroes,* and that *some* Negroes have narrower nostrils than *some* Swedes. Kajji noses vary between about 30 to 54 millimeters, while Swedish noses range from about 19 to 37 millimeters. Therefore, if one were to draw a line between 30 and 37 millimeters long, and present it to an expert, asking him to designate whether this line represented the nose-width of a Negro or a Swede, he could not tell from whicl group it had been taken. This would be true in spite of the fact that we are dealing here with populations that represent ex-

treme forms taken by their respective races in the characteristic being measured.[62]

". . . Consequently, we may state as a general principle that *greater differences exist in the range of physical traits that characterize any single race of mankind than between races taken in their entirety.*" [63]

It becomes clear that the use of physical features as the basis for racial definitions of groups or racial identifications of individuals becomes a very slippery problem.[64]

The development in the last century of a scientific study of human genetics has not solved the problems in obtaining the perfect delineation of race. Certain blood types, such as the ABO blood groupings and the rhesus factor, in which heredity patterns can be exactly traced, have been studied exhaustively throughout the entire world. Although the techniques are highly scientific, the studies suffer from the same fundamental weakness as the morphological studies. *If* the classifier can find an isolated and endogamous population group, which itself could be designated as a race, he can make some general conclusions about the average blood type frequencies for the *group*. However, he cannot say from the group averages what type blood an individual will have. And he cannot tell from

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62. The subjects used in this example were not selected at random from their respective geographical white and negro races, but were selected because of a special characteristic peculiar to a limited population group which might be considered a local race. Had the study used random measurements from the geographical races, we could have expected greater range within the races and even greater areas of overlap between them.

63. Herskovits, *Cultural Anthropology*, 61-62 (1964).

64. Even the selection of typologic traits for use in determining race appears to be arbitrary depending on what kind of race the classifier wants to find. Montagu indicates that racial classification became a "parlor game" in which "only those methods of 'race' classification which indicated the 'right sort' of 'race differences' were encouraged and utilized." Montagu, *The Fallacy of Race*, 66; See also Dobzhansky, *Mankind Evolving*, 256.

a person's blood type to what race he necessarily belongs.[65] And also, like the morphological classifications, when significant admixture has occurred, the problem of classification becomes vastly more difficult.[66]

Much of the foundation for the biological supremacy argument has come from studies proving that there are average differences in certain biological characteristics. The error of the lawmakers—like the error of the early observers of race—was to equate difference with biological supremacy, and average differences of a whole population with specific differences in individuals.

Most biological differences between races are believed to represent adaptations to the specific environment in which the race developed. For example the dark skin of the Negroes may provide a shield against the burning sun of the equatorial regions while the lighter skin of northern peoples may permit the less intense light rays to penetrate the skin and help manufacture vitamin D. The long narrow nose of the Caucasoids may allow for warming up cold outside air before it enters the lungs, while the shorter broader nose of the Africans may be more suited to their evenly warmer surroundings.[67]

Even these differences are not as significant today as they may have been in the past, because technological developments "have so greatly changed man's environment and his ability to cope with it . . . that adaptations to former environments are becoming largely obsolete."[68]

But to dwell on this type of question is to confuse the whole issue of biological superiority. The real issue was succinctly put by the distinguished team of human biologists

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65. "When the classifications were based on serological criteria rather than the populations, the results were understandably bizarre." Garn, *Human Races*, 50 (1961). See also, studies in Comas, *op. cit.* pp. 303-307; Hulse, *op. cit.* pp. 295-340.

66. Stern, *op. cit.* 689.

67. Stern, *op. cit.* 695.

68. *Id.*

assembled in 1964 by UNESCO to formulate a statement on the biological aspects of race.

> "Certain physical characters have a universal biological value for the survival of the human species, irrespective of the environment. The differences on which racial classifications are based do not affect these characters, and therefore, it is not possible from the biological point of view to speak in any way whatsoever of a general inferiority or superiority of this or that race."[69]

Thus it becomes entirely clear that the whole superiority notion on which these statutes are based is fallacious.

(d) *Miscegenation Is Not Biologically Harmful.*

By the same token, the judicial justification of the statutes on the basis of detrimental effects upon the offspring of interracial marriages[70] falls completely upon investigation. It has never been proved that interracial marriages have biological disadvantages.[71] This has recently

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69. Statement on The Biological Aspects of Race, UNESCO, 1964. The UNESCO statement so clearly sets forth the fundamental concepts of race and so clearly shows the invalidity of miscegenation laws that it is printed in its entirety as "Appendix B" of the Brief. The statement was signed by many of the world's foremost biologists and anthropologists, including Carlton Coon, whose work has been widely misinterpreted as providing material for racist arguments.

70. "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observations show us, that the offspring of these unnatural connections are generally sick and effeminate, and that they are inferior in physical development and strength to the full blood of either race . . . Such connections never elevate the inferior race to the position of superior, but they bring down the superior to that of the inferior. They are productive of evil, and evil only, without any corresponding good." *Scott v Georgia*, 39 Ga. 321, 323 (1869).

71. UNESCO Statement, paragraph 9.

been confirmed by one of the most exhaustive studies of interracial matings over conducted, the results of which were released this year. A ten-year investigation of 179,000 births in Hawaii, a state which prides itself on its racial mixture and its lack of racial prejudice, concluded that there are no significant adverse effects detectable from racial mixtures.[72]

In fact, it has been suggested that miscegenation can be positively beneficial to the species by increasing stature, resistance to disease, viability and fertility, a phenomenon known as "hybrid vigor."[73]

(e) *The Preservation of Racial Superiority Is Not a Fit Purpose of Legislation.*

Moreover, the whole concept of a biologically superior race is anathema to our society. We reacted in horror when Hitler proclaimed and enacted laws based on the theory of a "master race" in Germany. He too, had recognized the "higher or lesser value" of the races and had sought to prevent a "niggerized world" in which his concept of "the humanly beautiful and sublime . . . would be lost forever."[74] We found nothing tolerable in Hitler's view of

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72. Morton, Chung, Mi, *Genetics of Interracial Crosses in Hawaii* in the series *Monographs in Human Genetics*, 1967.

73. Stern, *op. cit.* p. 699-701; Harrison, *et al., op. cit.* 163-164. The UNESCO Statement reads: "It has never been proved that interbreeding has biological disadvantages for mankind as a whole. On the contrary, it contributes to the maintenance of biological ties between human groups and thus to the unity of the species in its diversity.

The biological consequences of a marriage depend only on the individual genetic make-up of the couple and not on their race.

Therefore, no biological justification exists for prohibiting intermarriage between persons of different races, or for advising against it on racial grounds."

74. *Mein Kampf*, pp. 383-84. Quoted in Shirer, *The Rise and Fall of the Third Reich*, 88 (1960).

racial superiority. It is far less tolerable in our own society today.

(f) *When the Myths Are Stripped Away, the Anti-Miscegenation Statutes Are Exposed as Being Totally Without Valid Public Purpose.*

Thus, since there is no factual basis to support the concept of biological superiority, the only remaining purpose of the anti-miscegenation statutes is to preserve biological differences; that is, to maintain differences in the color of one's skin, the shape of one's nose and the texture of one's hair. The mere statement of such a purpose shows the absurdity of the entire concept. We do not legislate on such differences within a race; there is no public purpose to be served by regulating nose size. These differences, for legislative purposes, are entirely neutral.[75]

No one would seriously contend that a law which prohibits marriage between light-skinned and dark-skinned people or between blue-eyed and brown-eyed people could be constitutionally sustained. Nor would anyone seriously contend that a law prohibiting marriage between Protestants and Catholics or between Italians and French would be constitutional. Whatever differences may exist between these groups can not provide proper bases for fixing public policy. Nor can the differences between Negroes and whites. Since the anti-miscegenation statutes provide discriminatory treatment merely on the basis of these legislatively neutral differences, they are, by definition, arbitrary and unconstitutional.

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75. The statutes, of course, do not even assure the fulfillment of these purposes. By operating indirectly on a racial basis rather than directly on the actual characteristics, they allow marriage of persons within the same race, even though one party may express certain features which are more likely found in the other race. More important, they prohibit marriages between members of different races, even though they do not possess the traits with which the legislature might have been concerned.

(C) The Anti-Miscegenation Statutes Must Fail Because They Provide Standards of Proof Which Are Impossible of Application and Are Unconstitutionally Vague.

Although the Virginia statute defines a "white" person as one who "has no trace whatever of any blood other than Caucasian," there is, of course, no such thing as "white blood" or "Negro blood" as imagined by the Virginia legislature. But assuming that blood is interpreted to mean ancestry, the state would have to prove beyond a reasonable doubt that Richard Loving had no ancestor *anywhere in his genealogy* who was not "Caucasian". Defendant Richard Perry Loving, in "admitting" he was a "white person" within the meaning of Virginia's penal code (and thereby convicting himself) could not, in fact, have made a knowing admission; nor could the state otherwise have proved he was such a "white person."

Similarly the anti-miscegenation statutes in the other sixteen states are based on the faulty concept of racially different blood, prohibiting marriage between "whites" (or "Caucasians") and "Negroes" or persons of more than a certain proportion of 'Negro blood". But even if they are based on racial ancestry, these terms—which attempt to set forth the essential elements of the crime—are unconstitutionally vague.

> "It is obfuscating, in science, to use the words negroid, mongoloid, caucasoid. Related expressions such as colored, black, yellow, white, do not set any biological contest, either. They have never been defined with any degree of precision or consistency by those who use them." [76]

It should be clear by now that these classifications *cannot* be made or applied with precision.[77]

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76. Beuttner-Janusch, *op. cit.* 184.

77. This Court has had occasion to consider the use of "Caucasian" as a racial definition and to note its vagueness: "It is at best

Furthermore, the courtroom proof of race necessarily depends upon appearance. Proof that one's father came from Africa is not sufficient to make him a Negro—particularly if his father had been the Prime Minister of Rhodesia. A defendant would be considered a "Negro" only if he *looked* like a "Negro" to a judge or jury (laymen) and that determination could be made only upon the morphological basis which scientists have rejected as an unreliable indicator of race. Thus the appearance test destroys any pretense of objectivity.

> "Owing to the variation within all races and the overlapping between contiguous races, it is unsafe to classify persons by their appearance and it should never be done for research purposes."[78]

If the test is too dangerous for the purpose of scientific study which carries with it no direct consequences to the individual involved, certainly it is too dangerous in the hands of a layman for the purposes of depriving a man of his liberty for ten years. It is well-established that—

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a conventional term, with an altogether fortuitous origin, which, under scientific manipulation, has come to include far more than the unscientific mind suspects. According to Keane, for example (The World's Peoples, 24, 28, 307, *et seq.*) it includes not only the Hindu but some of the Polynesians (that is, the Maori, Tahitians, Samoans, Hawaiians, and others), the Hamites of Africa, upon the ground of the Caucasic cast of their features, though in color they range from brown to black. We venture to think that the average well-informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements." *US v Bhagat Singh Thind*, 261 US 211.

The statutory classifications, which deal with arbitrarily selected and constitutionally vague concepts to begin with, become even more arbitrary by the use of different tests for determining race. In Virginia, a person is "white" only if he is "pure" white, but he is "Negro" if there is any taint of "Negro blood." A more inconsistent and arbitrary classification could hardly be imagined.

78. Laughlin, "Races of Mankind: Continental and Local", Anthropological Papers of the University of Alaska, Vol. 8, No. 2, May, 1960; Reprinted in Lasker (ed.), *Physical Anthropology, 1953-1961*, Yearbook of Physical Anthropology, Vol. 9, pp. 149, 153.

> "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide without any legally fixed standards what is prohibited and what is not in each particular case." *Giaccio v Pa.*, 382 US 399, 402-403.

The anti-miscegenation statutes clearly run afoul of this test. On this basis alone, they cannot stand.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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APPENDIX A

RELEVANT PORTIONS OF STATE STATUTES PROHIBITING INTERRACIAL MARRIAGES

(With Comments of Amici Curiae)

1. Alabama

Ala. Const. Art. IV, §102. The legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.

Ala. Code Tit. 1, §2. *Meaning of certain words and terms.* The word "negro" includes mulatto. The word "mulatto" or the term "person of color" means a person of mixed blood descended on the part of the father or mother from negro ancestors, without reference to or limit of time or number of generations removed.

Tit. 14, §16. *Living in adultery or fornication.* If any man or woman live together in adultery or fornication, each of them shall, on the first conviction of the offense, be fined not less than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months; on the second conviction for the offense, with the same person, the offender shall be fined not less than three hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than twelve months; and, on a third, or any subsequent conviction, with the same person, shall be imprisoned in the penitentiary for two years.

Tit. 14, §360. *Marriage, adultery, and fornication between white persons and negroes.* If any white persons and any negro, or the descendant of any negro intermarry, or live

in adultery or fornication with each other, each of them shall, on conviction, be imprisoned in the penitentiary for not less than two nor more than seven years.

Tit. 14, §361. *Officer issuing license or performing marriage ceremony.* Any probate judge who issues a license for the marriage of any persons who are prohibited by section 360 of this title, from intermarrying, knowing that they are within the provisions of that section; and any justice of the peace, minister of the gospel, or other person by law authorized to solemnize the rites of matrimony, who performs a marriage ceremony for such persons, knowing that they are within the provisions of such section, shall each, on conviction, be fined not less than one hundred or more than one thousand dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months.

Tit. 14, §419. *Seduction.* Any man who, by means of temptation, deception, arts, flattery, or a promise of marriage, seduces any unmarried woman in this state, shall, on conviction, be imprisoned in the penitentiary for not less than one nor more than ten years; but no indictment or conviction shall be had under this section on the uncorroborated testimony of the woman upon whom the seduction is charged; and no conviction shall be had if on trial it is proved that such woman was at the time of alleged offense, unchaste.

Tit. 14, §16. *Living in adultery or fornication.* If any man or woman live together in adultery or fornication, each of them shall, on the first conviction of the offense, be fined not less than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months; on the second conviction for the offense, with the same person, the offender shall be fined not less than three hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than twelve months; and, on a third, or any sub-

sequent conviction, with the same person, shall be imprisoned in the penitentiary for two years.

Comments. Both the Constitution and Code of Alabama invoke criminal penalties under the above provisions where a "negro, or descendant of a negro" is involved, thereby imposing upon any particular individual the uncertainties of the heavy burden that *no ancestor* of his had *any* "negro blood". Thus, merely the person's appearance may support a conclusion that he is a Negro; *Metcalf v. State*, 16 Ala. App. 389, 73 So. 305 (1918), and the testimony of a single individual will suffice: *Wilson v. State*, 20 Ala. App. 137, 101 So. 417 (1924).

While marriage is an absolute defense to a prosecution for seduction: *Martin v. State*, 19 Ala. App. 251, 96 So. 734 (1923), presumably such defense would not be available to an interracial couple whose marriage itself would constitute a crime.

Further, presumably a Japanese individual would be in a "twilight zone" who may freely intermarry either with a "white" or a "negro" without running afoul of the anti-miscegenation provision; or such individual may very well be found guilty upon marrying *either* a "white" *or* a "negro" depending upon the impression he may make upon a jury which may decide he is a "white" or a non-Negro, or a "negro", or perhaps "mulatto".

2. Arkansas (Ark. Stat. Anno.)

§41-806. *Concubinage—Penalty.* Concubinage between a person of the Caucasian or white race and between a person of the negro or black race, is hereby made a felony and whoever shall be convicted thereof in any court of competent jurisdiction shall, for each offense, be sentenced to imprisonment at the discretion of the court for a term of not less than one [1] month nor more than one [1] year in the penitentiary at hard labor.

§41-807. *Concubinage—Proof of violation—Definition.* The living together or cohabitation of persons of the Caucasian and of the negro race shall be proof of the violation of the provisions of section one [§41-806] of this act. For the purpose of this act [§§41-806- 41-810] concubinage is hereby defined to be the unlawful cohabitation of persons of the Caucasian race and of the negro race, whether open or secret.

§41-808. *"Person of negro race" defined.* The words "person of negro race" as used in this act [§§41-806-41-810] shall be held to apply and include any person who has in his or her veins any negro blood whatever.

§41-809. *Enforcement of concubinage statute.* It shall be the duty of the judges of the several district courts of this State to specially charge the grand juries upon this act [§§41-806-41-810], and it shall be the duty of the magistrates of the counties in which the offense of concubinage between a person of the Caucasian race and a person of the negro race has been committed, or where there shall be complaint made to the magistrate that any woman resident in the county who shall have been delivered of a mulatto child, charging on oath any person with being the father of such child, the magistrate shall issue a warrant, in the name of the State, against the accused person to the sheriff or any constable of the county, commanding him forthwith to arrest and bring the accused person before the magistrate to answer such charge and if the magistrate is of opinion that there is not sufficient cause

for believing that the defendant has committed the offense of concubinage or unlawful cohabitation as defined by this act, he shall discharge the defendant from custody and make an entry thereof on the minutes, however, if the magistrate be of the opinion from the examination that there are reasonable grounds to believe the defendant guilty of the offense charged he shall be held for trial and committed to jail or discharged on bail to answer at the next term of the circuit court.

§41-810. *Delivery of mulatto child as prima facie evidence. Definition.*—Any woman who shall have been delivered of a mulatto child, the same shall be prima facie evidence of guilt without further proof and shall justify a conviction of the woman, but no person shall be convicted of the crime of concubinage upon the testimony of the female, unless the same is corroborated by other evidence.

Provided, that this act [§§41-806-41-810] shall apply to cases of concubinage which is here defined to be the keeping and maintaining for immoral purpose persons of the opposite races named in this act.

§55-104. *White and negroes or mulattoes forbidden to marry.* All marriages of white persons with negroes or mulattoes are declared to be illegal and void.

§55-105. *Unlawful marriage—Penalty.* Whoever shall contract marriage in fact, contrary to the prohibitions of the third and fourth [§§55-103, 55-104] sections of this act, and whoever shall knowingly solemnize the same, shall be deemed guilty of a misdemeanor, and shall upon conviction be fined or imprisoned, or both, at the discretion of the jury who shall pass on the case, or if the conviction shall be by confession, or on demurrer, then at the discretion of the court.

§55-228. *Race other than Caucasian to be designated on record.* It shall be the duty of the Clerks of the county courts of the State to designate upon the record of all marriages the race of the participating parties where such race is other than Caucasian or white.

§55-229. *Violation of preceding section—Penalty.* Any violation of the provisions of this act [§§34-1208, 55-228, 55-229] shall, on conviction, be punished by a fine of twenty-five dollars ($25.00) for each offense.

Comments. Under Arkansas' concubinage laws prohibiting cohabitation of "Caucasian" and "negro", presumably marriage would be no defense even though validly contracted in another state. Further, it is to be noted that giving birth to a "mulatto child" constitutes "prima facie evidence of guilt" (§41-810) without any statutory exceptions for marriages which may have been validly entered into in another state. Cases construing the cohabitation provisions include: *Hovis v. State,* 162 Ark. 31, 257 S.W. 363 (1924), holding that more than frequent sexual relations between a white male defendant and the Negro woman must be shown; *Wilson v. State,* 178 Ark. 120, 13 S.W. 2d 24 (1929), convicting a white woman under the concubinage laws; *Poland v. State,* 232 Ark. 669, 339 S.W. 2d 421 (1960); *Hardin v. State,* 232 Ark. 672, 339 S.W. 2d 428 (1960).

3. Delaware (Del. Code Anno.)

Tit. 13, §101. *Void and voidable marriages.*

(a) A marriage is prohibited and void between—

(1) A person and his or her ancestor, descendant, brother, sister, uncle, aunt, niece, nephew or first cousin;

(2) A white person and a negro or mulatto.

* * * * * * *

Tit. 13, §102. *Entering into a prohibited marriage—penalty.* The guilty party or parties to a marriage prohibited by section 101 of this title shall be fined $100, and in default of payment of the fine shall be imprisoned not more than 30 days.

Tit. 13, §103. *Issuing license for, or solemnizing prohibited marriage—penalty.* Whoever, being authorized to issue a marriage license, knowingly or willfully issues a license for a marriage prohibited by this chapter, or, being authorized to solemnize a marriage, knowingly or willfully assists in the contracting or solemnizing of a prohibited marriage, shall be fined $100, and in default of the payment of such fine shall be imprisoned not more than 30 days.

Tit. 13, §104. *Entering into prohibited marriage outside the State—penalty.* If a marriage prohibited by this chapter is contracted or solemnized outside of the State, when the legal residence of either party to the marriage is in this State, and the parties thereto shall afterwards live and cohabit as husband and wife within the State, they shall be punished in the same manner as though the marriage had been contracted in this State.

Tit. 13, §105. *Status of children of prohibited marriages.* Children of void or voidable marriages shall be deemed to be legitimate.

Comments. While Delaware residents who go out of the State and enter into a miscegenous marriage prohibited by Delaware and return to Delaware to "live and cohabit as husband and wife" would be subject to criminal *punishment* (Tit. 13, §104), there is no provision that such marriage itself would be void. There appear to be no definitions as to the terms "white", "negro" or "mulatto."

4. Florida.

Fla. Const., Art. 16, §24. *Intermarriage of white persons and negroes prohibited.* All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited.

Fla. Stat. Anno. §1.01 *Definitions* (6) The words "negro," "colored," "colored persons," "mulatto" or "persons of color," when applied to persons, include every person having one-eighth or more of African or negro blood.

§741.11 *Marriages between white and negro persons prohibited.* It is unlawful for any white male person residing or being in this state to intermarry with any negro female person; and it is in like manner unlawful for any white female person residing or being in this state to intermarry with any negro male person; and every marriage formed or solemnized in contravention of the provisions of this section shall be utterly null and void, and the issue, if any, of such surreptitious marriage shall be regarded as bastard and incapable of having or receiving any estate, real, personal or mixed, by inheritance.

§741.12 *Penalty for intermarriage of white and negro persons.* If any white man shall intermarry with a negro, or if any white woman shall intermarry with a negro, either or both parties to such marriage shall be punished by imprisonment in the state prison not exceeding ten years, or by fine not exceeding one thousand dollars.

§741.13 *County judges not to issue licenses for white and negro intermarriages.* All county judges are prohibited from knowingly issuing a license to any person to intermarry against whom the disabilities in sec. 741.11 specified may or do attach, under the penal sum of one thousand dollars, to be recovered by action of debt in any court of record having jurisdiction, for the use of the school fund.

§741.14 *Penalty for violation of sec. 741.11.* If any county judge shall knowingly and willfully issue a marriage license for a white person to marry a negro, he shall be punished by imprisonment not exceeding two years, or by fine not exceeding one thousand dollars.

§741.15 *Marriage between white and negro persons not to be performed.* Any of the persons described in sec. 741.07, who shall knowingly perform the ceremony of marriage between any persons who by the provisions of sec. 741.11 are prohibited to intermarry shall in like manner forfeit and pay the penal sum of one thousand dollars, to be recovered in like manner as in sec. 741.13 for the use of the school fund.

§741.16 *Penalty for marrying white and negro persons.* If any judge, justice of the peace, notary public or minister of the Gospel, clergyman, priest or any person authorized to solemnize the rites of matrimony, shall willfully and knowingly perform the ceremony of marriage for any white person with a negro, he shall be punished by imprisonment not exceeding one year, or by fine not exceeding one thousand dollars.

§798.04 *White persons and negroes living in adultery.* If any white person and negro, or mulatto, shall live in adultery or fornication with each other, each shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding one thousand dollars.

§798.05 *Negro man and white woman or white man and negro woman occupying same room.* Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the night time the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.

Comments. Insofar as a person of Japanese ancestry is concerned, the same dilemma as exists under Alabama's laws—whether a Japanese resident is "white" or "negro"

—is posed with the attendant risk of making the wrong assumption if such a person should intermarry with a "white" person *or* with a "negro". Also while any person in the "fourth generation" (Fla. Const., Art. 16, §24) may likewise face a similar dilemma imposed by the possible bloodlines of his great-grandparents, this burden is somewhat alleviated by the requirement that proof that a defendant is one-eighth Negro "must be proved beyond and to the exclusion of every reasonable doubt". *Free v. State*, 142 Fla. 233, 194 So. 639 (1940). Under §741.12, the court is not required to punish both parties to the prohibited marriage. Presumably this violates the Equal Protection clause.

5. Georgia (Ga. Code Anno.)

Tit. 53, §106. *Miscegenation prohibited.* It shall be unlawful for a white person to marry anyone except a white person. Any marriage in violation of this section shall be void.

Tit. 53, §301. *Registration of individuals as to race, supervision, forms, etc.* The State Board of Health shall prepare a form for the registration of individuals, whereon shall be given the racial composition of such individuals, as Caucasian, Negro, Mongolian, West Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasian strains, and if there shall be any mixture, the racial composition of the parents and other ancestors, in so far as ascertainable, so as to show in what generation such mixture occurred. Said form shall also give the date and place of birth of the registrant, name, race, and color of the parents of the registrant, together with their place of birth if known, name of husband or wife of registrant, with his or her place of birth, names of children of registrant with their ages and place of residence, place of residence of registrant for five years immediately preceding registration, and such other information as may be prescribed for identification by the State Board of Health.

Tit. 53, §303. *Local registration.* Each local registrar shall personally or by deputy, upon receipt of said forms, cause each person in his district or jurisdiction to execute said form in duplicate, furnishing all available information required upon said form, the original of which form shall be forwarded by the local registrar to the State Board of Health, and a duplicate delivered to the ordinary of the county. Said form shall be signed by the registrant, or, in case of children under fourteen years of age, by a parent or guardian, or other person standing in loco parentis. The execution of such registration certificates shall be certified to by the local registrar.

Tit. 53, §304. *Authenticity of statement.* If the local registrar shall have reason to believe that any statement made by any registrant is not true, he shall so write upon such certificate before forwarding the same to the State Board of Health or ordinary, giving his reason therefor.

Tit. 53, §306. *False registration prohibited.* No person shall wilfully or knowingly make or cause to be made a registration certificate false as to color or race, and upon conviction thereof in such case the State Board of Health may change the registration certificate so that it will conform to the truth.

Tit. 53, §307. *Marriage license, form of application for, provided.* The State Board of Health shall prepare a form for application for marriage license, which form shall require the following information to be given over the signatures of the prospective bride and groom: name and address; race and color; place of birth; age; name and address of each parent; race and color of each parent; and whether the applicant is registered with the Bureau of Vital Statistics of this or any other State, and, if registered, the county in which such registration was made. The State Board of Health shall at all times keep the ordinary of each county in this State supplied with a sufficient number of said forms of application for marriage license to care for all applications for marriage license. Each prospective bride and each prospective groom applying for a marriage license shall fill out and execute said application in duplicate.

Tit. 53, §309. *Report of State Board of Health after examination as to registration of applicant.* The ordinary shall withhold the issuing of any marriage license until a report upon such application shall have been received from the State Board of Health. Said report shall be forwarded to the ordinary by the next return mail, and shall state whether or not each applicant is registered in the Bureau of Vital Statistics; if registered, the report shall state whether the statements made by each applicant as to race and color are

correct according to such registration certificate. If the registration certificate in the office of the Bureau of Vital Statistics shall show that the statement of either applicant as to race or color is untrue, the report of the State Board of Health shall so state, and in such case the ordinary shall not issue a marriage license to the applicants until the truth of such statements of the applicants shall have been determined in a legal proceeding brought against the ordinary to compel the issuing of such license. If the report from the State Board of Health shall show that the applicants are not registered, and if the State Bureau of Vital Statistics shall have no information as to the race or color of said applicants, the ordinary shall issue the marriage license if he shall have no evidence or knowledge that such marriage would be illegal. If one of the applicants shall be registered with the State Bureau of Vital Statistics and the other applicant shall not be so registered, if the Bureau of Vital Statistics shall contain no information to disprove the statements of either applicant as to color or race, the ordinary shall issue the marriage license, if he shall have no evidence or knowledge that such marriage would be illegal; Provided, that where each party is registered and such registration certificate is on file in the office of the ordinary of the county where application for marriage license is made, it shall not be necessary for the ordinary to obtain any information from the State Bureau of Vital Statistics; and Provided further, that when any person who has previously registered as required herein shall move to another county, he may file with the ordinary of the county of his new residence a certified copy of his registration certificate, which shall have the same effect as if such registration had been made originally in said county.

Tit. 53, §312. *"White person" defined.* The term "white person" shall include only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person, any one of whose ancestors has been duly registered with the

State Bureau of Vital Statistics as a colored person or person of color, shall be deemed to be a white person.

Tit. 53, §313. *Report of violation of chapter, duty of State Board of Health.* If any case of a marriage in violation of the provisions of this chapter shall be reported to the State Board of Health, it shall investigate such report and shall turn over to the Attorney General the information obtained through such investigation.

Tit. 53, §314. *Birth of legitimate child of white parent and colored parent, report of, and prosecution.* When any birth certificate, showing the birth of a legitimate child to parents one of whom is white and one of whom is colored, shall be forwarded to the Bureau of Vital Statistics, it shall be the duty of the State Board of Health to report the same to the Attorney General or the State, with full information concerning the same. Thereupon it shall be the duty of the Attorney General to institute criminal proceedings against the parents of such child for any violation of the provisions of this Chapter which may have been committed.

Tit. 53, §315. *Attorney General, duty to enforce chapter.* It shall be the duty of the Attorney General of the State, as well as the duty of the solicitor general of the superior court where such violation shall occur, to prosecute each violation of any of the provisions of this Chapter, when the same shall be reported to him by the State Board of Health. If the Attorney General shall fail or refuse to prosecute any such violation so reported to him, the same shall be grounds for impeachment, and it shall be the duty of the State Board of Health to institute impeachment proceedings in such case.

Tit. 53, §9902. *Intermarriage of whites and colored people.* If any officer shall knowingly issue a marriage license to persons, either of whom is of African descent and the other a white person, or if any officer or minister of the gospel shall join such persons in marriage, he shall be guilty of a misdemeanor.

Tit. 53, §9903. *Miscegenation; penalty.* Any person, white or colored, who shall marry or go through a marriage ceremony in violation of the provisions of section 53-106 shall be guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than one year and not more than two years.

Tit. 53, §9904. *False statement in application for marriage license; penalty.* Any person who shall make or cause to be made a false statement as to race or color of himself or parents, in any application for a marriage license, shall be guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than two nor more than five years.

Tit. 53, §9906. *Refusal to execute registration certificate, etc.* Any person who shall refuse to execute the registration certificate as provided in Chapter 53-3, or who shall refuse to give the information required in the execution of the same, shall be guilty of a misdemeanor. Each such refusal shall constitute a separate offense.

Tit. 53, §9907. *False registration.* Any person who shall wilfully or knowingly make or cause to be made a registration certificate false as to color or race, in violation of section 53-306, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state penitentiary for not less than one year and not more than two years.

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Tit. 79, §103. *Persons of color, who are.* All Negroes, mulattoes, mestizos, and their descendants, having any ascertainable trace of either Negro or African, West Indian, or Asiatic Indian blood in their veins, and all descendants of any person having either Negro or African, West African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color.

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Tit. 26, §5801. *Punishment; suspension of prosecution by marriage.* Any man and woman who shall live together in a state of adultery or fornication, or of adultery and fornication, or who shall otherwise commit adultery or fornication or adultery and fornication, shall be severally indicted, and shall be severally punished as for a misdemeanor; but it shall at any time be within the power of the parties to prevent or suspend the prosecution and the punishment by marriage, if such marriage can be legally solemnized.

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Tit. 26, §6001. *Definition and punishment.* Any person who shall, by persuasion and promises of marriage or other false and fraudulent means, seduce a virtuous unmarried female and induce her to yield to his lustful embraces and allow him to have carnal knowledge of her, shall be punished by imprisonment and labor in the penitentiary for not less than two nor more than 20 years.

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Tit. 26, §6002. *Prosecution may be stopped by marriage; bond of seducer.* A prosecution under the preceding section may be stopped at any time before arraignment and pleading, and not otherwise, by the marriage of the parties, or a bona fide and continuing offer to marry on the part of the seducer: Provided, that the seducer shall, at the time of obtaining the marriage license from the ordinary of the county of the female's residence, give a good and sufficient bond in such sum as said ordinary may deem reasonable and just, taking into consideration the condition of the parties, payable to said ordinary and his successors in office, and conditioned for the maintenance and support of the female and her child or children, if any, for the period of five years. If the defendant is unable to give the bond, the prosecution shall not be at an end until he shall live with the female in good faith for five years. In case the defendant fails to comply with the provisions of this section, the wife shall be a competent witness to testify against the husband in all such

cases, whether the marriage to suspend such prosecution was before or after indictment of said defendant.

Comments. Georgia's efforts to set forth a comprehensive statute presents several inconsistencies. Initially, a "white person" may marry only a "white person": (§53-106); however, the penal provision imposes criminal sanctions only on miscegenous marriages of "white or colored" persons: (§53-9902). While "Japanese" are included in the specific enumerations of §53-312, such persons are *not* identified as "persons of color" in §79-103. Therefore, should a "white person" marry a "Japanese", i.e., a non-white person, then under §53-9903 *only* the "white person" would be subject to criminal sanctions but not the "Japanese", although by operation of §53-106 the marriage would be "void". This, of course, results in unequal protection of the laws against "white persons". However, the "Japanese" may very well be prosecuted for "adultery or fornication" (§26-5801) which, however, is a misdemeanor as compared to a felony under §53-9903.

While marriage or a "bona fide and continuing offer to marry on the part of the seducer" (§26-6002) is a defense to the charge of seduction, it would appear quite certain that such a defense would be denied to a defendant where the marriage, or proposed marriage, would run afoul of the prohibitions of §53-106.

6. Kentucky (Ky. Rev. Stat.)

§402.020. *Other Prohibited Marriages.* Marriage is prohibited and void:

(1) With an idiot or lunatic;

(2) Between a white person and a Negro or mulatto;

* * *

§402.040. *Marriage in another state.* If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized.

§402.990. *Penalties.*

(1) Any party to a marriage prohibited by KRS 402.010 or between a white person and Negro or a mulatto shall be fined not less than five hundred nor more than five thousand dollars. If the parties continue after conviction to cohabit as man and wife, either or both of them shall be imprisoned in the penitentiary for not less than three nor more than twelve months.

(2) Any person who aids or abets the marriage of any feeble-minded person, or attempts to marry, or aids or abets any attempted marriage with, an idiot or lunatic shall be fined not less than fifty nor more than five hundred dollars.

(3) Any authorized person, with or without a license, who knowingly solemnizes a marriage prohibited by this chapter shall be fined not more than one thousand dollars or imprisoned not less than one month nor more than twelve months, or both.

(4) Any minister or priest who breaches the covenant required by KRS 402.060 shall be fined not more than two thousand dollars.

(5) Any person who attempts to solemnize a marriage without a marriage license or without being authorized by the county court to solemnize marriages shall be fined not more than one thousand dollars or imprisoned for not less than one month nor more than twelve months, or both.

(6) Any unauthorized person who solemnized a marriage under pretense of having authority, and any person who falsely personates the father, mother or guardian of an applicant in obtaining a license shall be imprisoned in the penitentiary for not more than three years.

(7) Any person who falsely and fraudulently represents or personates another, and in such assumed character marries that person, shall be imprisoned in the penitentiary for not less than one nor more than five years. Indictment under this subsection shall be found only upon complaint of the injured party and within two years after the commission of the offense.

(8) Any clerk who knowingly issues a marriage license to any persons prohibited by this chapter from marrying shall be fined not less than five hundred nor more than one thousand dollars, and removed from office by the judgment of the court in which he is convicted.

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§436.010. *Seduction of female under twenty-one.*

(1) Any person who, under promise of marriage, seduces and has carnal knowledge of any female under twenty-one years of age, shall be confined in the penitentiary for not less than one nor more than five years..

(2) No prosecution under subsection (1) of this section shall be instituted where the person charged has

married the girl seduced or offers and is willing to marry her unless he willfully and without a cause constituting a ground of divorce provided in KRS 403.020 for the husband, abandons or deserts her within three years after the marriage.

(3) Any prosecution instituted under subsection (1) of this section shall, upon the request of the defendant, be suspended if the accused marries the girl before final judgment. The prosecution shall be renewed and proceed as though no marriage had taken place if the accused, willfully and without cause constituting a ground of divorce provided in KRS 403.020 for the husband, abandons or deserts wife within three years after the marriage.

(4) All prosecutions under subsection (1) of this section shall be instituted within four years after the commission of the offense.

Comments. Kentucky makes no attempt to define the terms "white person" or "Negro" or "mulatto". However, in *McGoodwin v. Shelby,* 182 Ky. 377, 206 S.W. 625 (1918) a mulatto was defined as a person with one-fourth or more of Negro blood. The court there relied primarily on the physical description of the grandmother. Also see *Theophanius v. Theophanius,* 244 Ky. 689, 51 S.W. 2d 957 (1932).

While it is by no means clear, presumably a Japanese and white may marry in Kentucky; however, whether a Japanese and a "Negro" may marry is problematical since it is not clear whether or not a Japanese may be considered a "white person".

7. Louisiana (West's La. Stat. Anno.)

La. Civil Code, Art. 94. *Impediments of direct line relationship; miscegenation.* Marriage between persons related to each other in the direct ascending or descending line is prohibited. This prohibition is not confined to legitimate children, it extends also to children born out of marriage. Marriage between white persons and persons of color is prohibited, and the celebration of all such marriages is forbidden and such celebration carries with it no effect and is null and void.

Art. 117. *Civil Effects of Putative Marriages.* The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith.

La. Rev. Stat. Ch. 9, §201. *Marriage between Indians and Colored Persons Prohibited.* Marriage between persons of the Indian race and persons of the colored or black race is prohibited, and the celebration of all such marriages is forbidden and such celebration carries with it no effect, and is null and void.

Ch. 14, §79. *Miscegenation.* Miscegenation is the marriage or habitual cohabitation with knowledge of their difference in race, between a person of the Caucasian or white race and a person of the colored or negro race.

Whoever commits the crime of miscegenation shall be imprisoned, with or without hard labor, for not more than five years.

Ch. 9, §391. *Legitimation of Natural Children.* Natural fathers and mothers shall have the power to legitimate their natural children, by act declaratory of their intentions, made before a notary public and two witnesses; provided there existed at the time of the conception of such children, no other legal impediments to the inter-marriage of their natural father and mother except those resulting from color or the institution of slavery.

Ch. 9, §221. *Going outside State to contract marriage prohibited in State.* If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes outside this state and there contracts a marriage prohibited and declared void by the laws of this state, the marriage is null and void for all purposes in this state with the same effect as though it had been entered into in this state.

Ch. 14, §79.2. *Conceiving and giving birth to an illegitimate child.* Conceiving and giving birth to two or more illegitimate children is hereby declared to be a crime. Both the father and mother of such children shall be equally guilty of the commission of this crime. Each such birth shall be a separate violation hereof.

A birth certificate showing a child to be illegitimate shall be prima facie proof of that fact.

Whoever commits the crime of conceiving and giving birth to two or more illegitimate children shall be fined not more than one thousand dollars, or imprisoned, for not more than one year, or both.

Comments. It is noted that whereas the criminal provision is aimed only at "miscegenation" between "a person of the Caucasian or white race and a person of the colored or negro race" (Ch. 14, §79) the civil prohibitions also include marriages between "persons of the Indian race and . . . colored or black race" (Ch. 9, §201).

According to an opinion of the Louisiana Attorney General (1948, 50 Op. Atty Gen. 248) a Negro serviceman who had married a white woman in New York would be prosecuted for miscegenation if he and his wife were transferred to Louisiana.

8. Maryland (Anno. Code of Md.)

Art. 27, §393. *Minister marrying negro with white person.* If any minister, pastor or other person who, according to the laws of this State do usually join people in marriage, shall upon any pretense join in marriage any negro with any white person, he shall on conviction be fined one hundred dollars.

Art. 27, §398. *Miscegenation.* All marriages between a white person and a negro, or between a white person and a person of negro descent, to the third generation, inclusive, or between a white person and a member of the Malay race or between a negro and a member of the Malay race, or between a person of negro descent, to the third generation, inclusive, and a member of the Malay race, are forever prohibited, and shall be void; and any person violating the provisions of this section shall be deemed guilty of an infamous crime, and punished by imprisonment in the penitentiary not less than eighteen months nor more than ten years; provided, however, that the provisions of this section shall not apply to marriages between white persons and members of the Malay race, or between negroes and members of the Malay race, or between persons of negro descent, to the third generation, inclusive, and members of the Malay race, existing prior to June 1, 1935.

Art. 27, §416. *White woman permitting herself to be got with child by negro.* Any white woman who shall suffer or permit herself to be got with child by a negro or mulatto, upon conviction thereof in the court having criminal jurisdiction, either in the city or county where such child was begotten or where the same was born, shall be sentenced to the penitentiary for not less than eighteen months nor more than five years.

Rule S-76. *Annulment—Criminal Conviction.* When a court shall convict one or both of the spouses of bigamy, of marrying within any prohibited degree, or of marrying be-

tween races prohibited by law to intermarry, the judgment of conviction shall serve as an annulment of the unlawful marriage, provided that there shall be recorded at the instance of any interested person on the records of a court of equity of the same county, a complete transcript of the docket entries in the criminal proceedings leading to said judgment of conviction.

Comments. Maryland's statutes contain no definition of the terms "white person" or "negro" or "a member of the Malay race". Whether a Japanese is any, or none, of these is uncertain; thus what criminal sanctions that a Japanese may be subjected to is similarly uncertain. It is also to be noted that a white married woman of a prohibited interracial marriage may be subjected to the criminal penalties of Art. 27, §416 if she has a child by her negro husband; presumably it would make no difference that the couple may have been validly married in another state: *Jackson v. Jackson*, 82 Md. 17, 33 A. 317 (1895), *dictum*.

9. Mississippi

Constitution, Art. 14, §263. The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more of negro blood, shall be unlawful and void.

Miss. Code Anno. §459. *Unlawful marriages—between white person and negro or Mongolian prohibited.* The marriage of a white person and a negro or mulatto or person who shall have one-eighth or more of negro blood, or with a Mongolian or a person who shall have one-eighth or more of Mongolian blood, shall be unlawful, and such marriage shall be unlawful and void; and any party thereto, on conviction, shall be punished as for marriage within the degrees prohibited by the last two sections; and any attempt to evade this and the two preceding sections by marrying out of this state and returning to it shall be within them.

§2000. *Adultery and fornication—between certain persons forbidden to inter-marry.* Persons being within the degrees within which marriages are prohibited by law to be incestuous and void, or persons who are prohibited from marrying by reason of race or blood and between whom marriage is declared to be unlawful and void, who shall cohabit, or live together as husband and wife, or be guilty of a single act of adultery or fornication, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

§2002. *Adultery and fornication—going out of this state to marry.* If any persons, citizens or residents of this state, who are prohibited by the laws thereof from marrying, because of kindred or race, shall go out of this state for the purpose of marrying, and shall marry in any other state or country, and return to this state and live together and cohabit as man and wife, or be guilty of a single act of copulation, they shall, on conviction, be punished, notwithstanding their marriage out of this state, by imprisonment in the peniten-

tiary not longer than ten years, or be fined five hundred dollars, or both.

§2339. *Races—social equality, marriages between—advocacy of punished.* Any person, firm or corporation who shall be guilty of printing, publishing or circulating printed, typewritten or written matter urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality or of intermarriage between whites and negroes, shall be guilty of a misdemeanor and subject to a fine not exceeding five hundred dollars or imprisonment not exceeding six months or both fine and imprisonment in the discretion of the court.

Comments. As indicated by Mississippi's statutes, a miscegenous marriage is subject to imprisonment "for a term not exceeding ten (10) years" (§2000) with no alternative of a fine. Moreover under this same section "a single act of . . . fornication" will subject them to the same penalty. The prohibitions of §2339 would seem to violate the guarantees of free speech of the First Amendment of The Constitution of the United States.

10. Missouri (Vernon's Anno. Mo. Stat.)

§451.020. *Certain marriages prohibited—official issuing licenses to certain persons guilty of misdemeanor.* All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, first cousins, white persons and nergoes, or white persons and Mongolians, and between persons either of whom is insane, mentally imbecile or feeble-minded, are prohibited and declared absolutely void; and it shall be unlawful for any city, county or state official having authority to issue marriage licenses to issue such marriage licenses to the persons heretofore designated, and any such official who shall issue such licenses to the persons aforesaid knowing such persons to be within the prohibition of this section shall be deemed guilty of a misdemeanor; and this prohibition shall apply to persons born out of lawful wedlock as well as those in lawful wedlock.

§563.240. *Intermarriage between white persons and negroes, penalty.* No person having one-eighth part or more of negro blood shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more of negro blood; and every person who shall knowingly marry in violation of the provisions of this section shall, upon conviction, be punished by imprisonment in the penitentiary for two years, or by fine not less than one hundred dollars, or by imprisonment in the county jail not less than three months, or by both such fine and imprisonment; and the jury trying any such case may determine the proportion of negro blood in any party to such marriage from the appearance of such person.

§563.250. *Marriages illegally solemnized — penalty.* Every person who shall solemnize any marriage, having knowledge of any fact which renders such marriage unlawful or criminal in either of the parties under any law of this state, or, having knowledge or reasonable cause to believe that either of the parties shall be under the age of legal consent,

or is insane, mentally imbecile, feeble-minded or epileptic, or where to his knowledge any other legal impediment exists to such marriage, and every person not authorized by law to solemnize marriages who shall falsely represent that he is so authorized, and who, by any pretended marriage ceremony which he may perform, shall deceive any innocent person or persons into the belief that they have been legally married, shall, on conviction, be adjudged guilty of a misdemeanor, and be punished by imprisonment in the county jail not exceeding one year, or by a fine not less than five hundred dollars, or by both such fine and imprisonment.

§559.310. *Seduction under promise of marriage.* If any person shall, under or by promise of marriage, seduce or debauch any unmarried female of good repute under twenty-one years of age, he shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not exceeding one thousand dollars, and imprisonment in the county jail not exceeding one year; but, if, before the jury is sworn to try the defendant upon an indictment or information, he shall marry the woman thus seduced, it shall be a bar to any further prosecution of the offense, but an offer to marry the female seduced by the party charged shall constitute no defense to such prosecution; and in all cases where the defendant marries the woman seduced the cause shall be dismissed at the defendant's costs, and in no event shall the state or county be adjudged to pay, or pay any cost made or incurred by the defendant when said cause has been dismissed as aforesaid.

Comments. Marriages between "white persons and negroes, or . . . Mongolians" are prohibited and void: §451.020. Criminal sanctions, however, while applying to marriages between a "white person" and a "negro" (§563.240) omit marriages between a "white person" and a "Mongolian". However, to a charge of seduction involving a female "white person", presumably neither a "Mongolian" nor a "negro" could successfully avail himself of the defense of marriage.

11. North Carolina.

Constitution, Art. XIV, §8.—*Intermarriage of whites and Negroes prohibited.* All marriages between a white person and a negro or between a white person and a person of negro descent to the third generation, inclusive, are hereby forever prohibited.

Gen. Stat. of No. Car. §51-3. *Want of capacity; void and voidable marriage.* All marriages between a white person and a negro or between a white person and a person of negro descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a negro or between a Cherokee Indian of Robeson County and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under 16 years of age and any male or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: provided, double first cousins may not marry; and provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or of negro descent to the third generation, inclusive, and for bigamy; provided further, that no marriage by persons either of whom may be under sixteen years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant followed by the separation of the parties within forty-five (45) days of the marriage which separation has been continuous for a period of

one year shall be voidable: Provided that no child shall have been born to the parties within ten (10) lunar months of the date of separation.

§14-181. *Miscegenation.* All marriages between a white person and a negro, or between a white person and a person of negro descent to the third generation inclusive, are forever prohibited and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or State's prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court.

§14-182. *Issuing license for marriage between white person and negro; performing marriage ceremony.* If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor.

§14-180. *Seduction.* If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court and may be imprisoned in the State prison not exceeding the term of five years; Provided, the unsupported testimony of the woman shall not be sufficient to convict; Provided further, that marriage between the two parties shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant, it shall operate as to the costs of the case as a plea of *nolo contendere*, and the defendant shall be required to pay all the costs of the action or be liable to imprisonment for non-payment of the same.

Comments. North Carolina's peculiar inclusion of "Cherokee Indian of Robeson County" in the class of "white person", in that neither may marry a "negro" is referred

to in *Goins v. Indian Training School*, 169 N.C. 736, 86 S.E. 629 (1915).

In determining whether the alleged Negro party is a "negro", the testimony that such person was known to associate with Negroes, was reputed to be a Negro and had the physical appearance of a Negro was accepted in *Hopkins v. Bowers*, 111 N.C. 175, 16 S.E. 1 (1892); also accepted were defendant's reputation in his community, the testimony by a doctor of defendant's general appearance at birth, and the physical characteristics of his parents and grandparents: *State v. Miller*, 224 N.C. 228, 29 S.E. 2d 751 (1944). Cf. *Ferrall v. Ferrall*, 153 N.C. 174, 69 S.E. 60 (1910)

12. Oklahoma

Constitution, Art. 23 §11. *Colored race—Negro race—White race.* Wherever in this Constitution and laws of this State, the word or words "colored" or "colored race," "negro" or "negro race," are used, the same shall be construed to mean or apply to all persons of African descent. The term "white race" shall include all other persons.

Okla. Stat. Anno. §43.12. *Miscegenation Prohibited.* The marriage of any person of African descent, as defined by the Constitution of this State, to any person not of African descent, or the marriage of any person not of African descent to any person of African descent, shall be unlawful and is hereby prohibited within this State.

§43.13. *Penalty for miscegenation.* Any person who shall marry in violation of the preceding section, shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars, and imprisoned in the penitentiary for not less than one nor more than five years.

Comments. In brief, in Oklahoma a person of "African descent" may marry only another person of "African descent" and such prohibition may not be avoided by Oklahoma domciliaries going to another state to be married: *Stevens v. United States,* 146 F. 2d 120 (CCA 10, 1944); *Baker v. Carter,* 180 Okla. 71, 68 P. 2d 85 (1937). Presumably a Japanese is a "white person"; this also appears to be the case under Texas' law, infra. Thus in both states, Japanese would be denied the right of marrying any person of "African descent". Query whether the term "persons of African descent" may include "white Rhodesians", for example.

13. South Carolina

Constitution, Art. 3, §33. *Marriages of whites and Negroes: sexual intercourse*—The marriage of a white person with a negro or mulatto, or person who shall have one-eighth of more of negro blood, shall be unlawful and void. No unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years.

Art. 2, §6. *Persons disqualified from voting.* The following persons are disqualified from being registered or voting:

First, Persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, house-breaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, micegenation, larceny, or crimes against the election laws: Provided, that the pardon of the Governor shall remove such disqualification.

Second, Persons who are idiots, insane, paupers supported at the public expense, and persons confined in any public prison.

So. Car. Code. §20-7. *Miscegenation; marriages between white persons and Catawba Indians are legal.*—It shall be unlawful (a) for any white man to intermarry with any woman of either the Indian or negro races or any mulatto, mestizo or half-breed, (b) for any white woman to intermarry with any person other than a white man or (c) for any mulatto, half-breed, Indian, negro or mestizo to intermarry with a white woman; and any such marriage or attempted marriage shall be utterly null and void and of no effect. Any person who shall violate any provision of this section shall be guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine of not less than five hundred dollars or imprisonment for not less than twelve months or both in the discretion of the court.

Provided, however, all white persons of this State who have occupied the relations of husband and wife and have cohabited as such with Catawba Indians prior to March 11, 1960 shall be deemed husband or wife, and entitled to all the rights and privileges and be subject to all the duties and obligations of that relation, in like manner as if they had been duly married according to law. Marriages taking place after March 11, 1960 between white persons of this State and Catawba Indians are declared legal in all respects.

§20-8. *Performing marriage ceremony involving miscegenation.*—Any clergyman, minister of the Gospel, magistrate or other person authorized by law to perform the marriage ceremony who shall knowingly and wilfully unite in the bonds of matrimony any persons of different races in violation of any provision of sec. 20-7 shall be guilty of a misdemeanor and, upon conviction thereof, shall be liable to the same penalty or penalties as provided in such section.

§20-5.1. *Marriage of parents legitimates illegitimate children.*—If the parents of an illegitimate child subsequently marry, the child shall become legitimate as if born in lawful wedlock and, as to the child so legitimated, all limitations imposed by law upon the amount of property that may be given illegitimate children by deed, will, inheritance or otherwise shall be removed. The provisions of this section shall be retroactive to the extent that they shall apply in all cases in which prior to May 2, 1951 the parents of an illegitimate child shall have married and the father and such child shall have been living on said date.

§16-405. *Seduction under promise of marriage.*—Any male person above the age of sixteen years who shall by any means of deception and promise of marriage seduce any unmarried woman in this State shall upon conviction be guilty of misdemeanor and shall be fined or imprisoned, at the discretion of the court. But no conviction shall be had under this section on the uncorroborated testimony of the woman upon whom the seduction is charged, and no conviction shall be had if on trial it is proved that such woman was at the

time of the alleged offense lewd and unchaste. And if the defendant in any action brought hereunder shall contract marriage with such woman, either before or after conviction, further proceedings hereunder shall be stayed.

§23-62. *Qualifications for registration; persons disqualified.*—Every citizen of this state and the United States who:

(1) Is twenty-one years of age or more;

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shall be registered; *provided, however*, that:

• • •

(c) Persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation, larceny or crimes against the election laws shall be disqualified from being registered or voting, unless such disqualification shall have been removed by the pardon of the Governor.

Comments. As indicated, persons convicted on "miscegenation" may neither register to vote nor vote. Under the provisions of §20-7, a "white woman" is limited to marrying only a "white man"; on the other hand, a "white man" is free to marry anyone except "any woman of either the Indian or negro races or any mulatto, mestizo or half-breed. . . ." Thus, for example a "white" male may freely marry a Japanese female but a "white" female could not marry a Japanese male. Whether the progeny from a marriage of a "white" male and Japanese female would be regarded as "white" or not presents some difficult speculations. For example, if any of the progeny are females, and such are *not* regarded as "white" then presumably such female progeny could freely marry a "negro"; on the other hand, if the progeny *are* considered to be "white", then a male progeny presumably could marry a "white" female. However, these would be risky speculations at best.

14. Tennessee

Constitution, Art. 11, §14. The intermarriage of white persons with negroes, mulattoes, or persons of mixed blood, descended from a negro to the third generation inclusive or their living together as man and wife in this State is prohibited. The legislature shall enforce this section by appropriate legislation.

Tenn. Code Anno. §36-402. *Whites and negroes or mulattoes forbidden to marry or cohabit.* The intermarriage of white persons with negroes, mulattoes, or persons of mixed blood descended from a negro, to the third generation inclusive, or their living together as man and wife in this state, is prohibited.

§36-403. *enalty for violating preceding section.* The person knowingly violating the provisions of sec. 36-402 shall be guilty of a felony, and undergo imprisonment in the penitentiary not less than one (1) nor more than five (5) years; and the court may, on the recommendation of the jury, substitue, in lieu of punishment in the penitentiary, fine and imprisonment in the county jail.

§36-419. *Solemnizing marriage between incapable persons—misdemeanor—penalty.* If any such minister or officer knowingly join together in matrimony two persons not capable thereof, he shall be guilty of a misdemeanor, and, also forfeit and pay the sum of five hundred dollars ($500), to be recovered by action of debt, for the use of the person suing.

§1-305. *Definitions of terms used in Code.*

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(11) "Negro" includes mulattoes, mestizos, and their descendants, having any blood of the African race in their veins.

15. Texas

Vernon's Tex. Civ. Stat., Art. 4607. *Certain intermarriages prohibited.*—It shall not be lawful for any person of Caucasian blood or their descendants to intermarry with Africans or the descendants of Africans. If any person shall violate any provision of this article, such marriage shall be null and void.

Vernon's Tex. Penal Code.

Art. 492. *Miscegenation.* If any white person and negro shall knowingly intermarry with each other in this State, or having so intermarried in or out of the State shall continue to live together as man and wife within this State, they shall be confined in the penitentiary not less than two nor more than five years.

Art. 493. *"Negro" and "white person."* The term "negro" includes also a person of mixed blood descended from negro ancestry from the third generation inclusive, though one ancestor of each generation may have been a white person. Any person not included in the foregoing definition is deemed a white person within the meaning of this law.

Art. 505. *Seduction.* If any person by promise to marry shall seduce an unmarried female under the age of twenty-five years and shall have carnal knowledge of such female, he shall be confined in the penitentiary not less than two nor more than ten years.

Art. 506. *Marriage obliterates offense.* If the parties marry each other at any time before the defendant pleads to the indictment before a court of competent jurisdiction, the prosecution shall be dismissed. If after the prosecution is begun and before he pleads to the indictment before a court of competent jurisdiction, the defendant in good faith offers to marry the female so seduced and she refuses to marry him, such refusal shall be a bar to further prosecution. This arti-

cle shall not apply to the case of a defendant who was in fact married at the time of committing the offense.

Comments. Since the civil statute employs the term "Caucasian" whereas the penal code employs the term "white person"—and the two terms are not equated by definition,—then a marriage between a "white person" and a one-sixteenth "negro" would not be subject to criminal penalties but nevertheless may be "null and void" under Art. 4607 of the civil statute. Also, presumably a Japanese is a "white person" for purposes of the penal code; however, since it is by no means clear that a Japanese is also a "Caucasian" within the meaning of the civil statute, it is conceivable that a marriage between a Japanese and "negro" would be valid for civil purposes and yet be subject to criminal sanctions.

16. Virginia (Va. Code)

§1-14. *Colored persons and Indians defined.* Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians.

§20-50. *Certificates of racial composition.* The State Registrar of Vital Statistics may prepare a form whereon the racial composition of any individual, as Caucasian, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains, and if there be any mixture, then, the racial composition of the parents and other ancestors, insofar as ascertainable, so as to show in what generation such mixture occurred, may be certified by such individual, which form shall be known as a registration certificate. The State Registrar of Vital Statistics may supply to each local registrar a sufficient number of such forms for the purpose of this chapter; each local registrar may, personally or by deputy, as soon as possible after receiving the forms, have made thereon in duplicate a certificate of the racial composition, as aforesaid, of each person resident in his district, who so desires, born before June fourteenth, nineteen hundred and twelve, which certificate shall be made over the signature of such person, or in the case of children under fourteen years of age, over the signature of a parent, guardian, or other person standing in loco parentis. One of such certificates for each person thus registering in every district shall be forwarded to the State Registrar of Vital Statistics for his files; the other shall be kept on file by the local registrar.

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§20-51. *False registration or certificate.* It shall be a felony for any person wilfully or knowingly to make a registration certificate false as to color or race. The wilful making of a false registration or birth certificate shall be punished by confinement in the penitentiary for one year.

§20-53. *License not to issue until clerk assured statements are correct.* No marriage license shall be granted until the clerk or deputy clerk has reasonable assurance that the statements as to color of both man and woman are correct.

If there is reasonable cause to disbelieve that applicants are of pure white race, when that fact is stated, the clerk or deputy clerk shall withhold the granting of the license until satisfactory proof is produced that both applicants are "white persons" as provided for in this chapter.

The clerk or deputy clerk shall use the same care to assure himself that both applicants are colored, when that fact is claimed.

§20-54. *Intermarriage prohibited; meaning of term "white persons."*—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.

§20-56. *Certain colored persons not married to be deemed husband and wife; children legitimated.*—Where colored persons prior to the twenty-seventh day of February, eighteen hundred and sixty-six, agreed to occupy the relation to each other of husband and wife, and were cohabiting together as such at that date, whether the rites of marriage

had been celebrated between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges, and subject to the duties and obligations of that relation in like manner, as if they had lawfully married; and all their children shall be deemed legitimate, whether born before or after such date. And where the parties had ceased to cohabit before the twenty-seventh day of February, eighteen hundred and sixty-six, in consequence of the death of the woman, or from any other cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate.

§20-57. *Marriages void without decree.*—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process.

§20-58. *Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in §20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

§20-59. *Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.

§20-60. *Punishment for performing ceremony.*—If any person perform the ceremony of marriage between a white person and a colored person, he shall forfeit two hundred dollars, of which the informer shall have one half.

Comments. Under §1-14 a Japanese presumably would not be a "colored person" although the last sentence of §20-54 appears to place a Japanese in the same category.

However, a person who was one-quarter American Indian and three-quarters Japanese would presumably be an "American Indian" under §1-14; if such person left Virginia with a "white person" and married out of the state and returned to Virginia, such marriage would be unlawful and void (§§20-54, 20-57) but may not be in violation of the evasion provision of §20-58 which does not apply to an "American Indian".

17. West Virginia (W. Va. Code Anno.)

§48-1-19. *Miscegenation; Penalties.*—Any white person who shall intermarry with a negro shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding one hundred dollars, and confined in jail not more than one year. Any person who shall knowingly perform the ceremony of marriage between a white person and a negro shall be guilty of a misdemeanor, and, upon conviction thereof shall be fined not exceeding two hundred dollars.

§48-2-1. *For What and When Marriage Void.*—All marriages between a white person and a negro; and all marriages prohibited by law because of the following:

1) One of the parties already married

* * *

shall be void from the time that they are so declared by a decree of nullity.

§61-8-3. *Adultery and Fornication; Penalty.*—If any person commit adultery or fornication, he shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than twenty dollars.

§61-8-4. *Lewd and Lascivious Cohabitation and Conduct; Penalty; Persons presumed to be Unmarried.*—If any persons, not married to each other, lewdly and lasciviously associate and cohabit together, or, whether married or not, be guilty of open or gross lewdness and lasciviousness, they shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty dollars, and may, in the discretion of the court, be imprisoned not exceeding six months, and, upon a repetition of the offense, they shall, upon conviction, be confined in jail not less than six nor more than twelve months. In prosecutions for adultery and fornication, and for lewdly and lasciviously cohabiting together, the persons named in the indictment shall be presumed to be unmarried persons in the absence of proof to the contrary.

Comment. No definition or attempted clarification of the terms "white person" and "negro" appearing in the statute, a Japanese resident, for example, of West Virginia would be taking a risk of making the wrong guess by marrying either a "white person" or a "negro"; or, of course, he may not be subject to any criminal sanctions or civil consequences. It is by no means clear. Under §48-1-19, only the "white person" shall be guilty of the offense, although the "negro" may be guilty under §61-8-4.

APPENDIX B

1964 UNESCO STATEMENT

PROPOSALS ON THE BIOLOGICAL ASPECTS OF RACE

The undersigned, assembled by Unesco in order to give their views on the biological aspects of the race question and in particular to formulate the biological part for a statement foreseen for 1966 and intended to bring up to date and to complete the declaration on the nature of race and racial differences signed in 1951, have unanimously agreed on the following:

1. All men living today belong to a single species, *Homo sapiens*, and are derived from a common stock. There are differences of opinion regarding how and when different human groups diverged from this common stock.

2. Biological differences between human beings are due to differences in hereditary constitution and to the influence of the environment on this genetic potential. In most cases, those differences are due to the interaction of these two sets of factors.

3. There is great genetic diversity within all human populations. Pure races—in the sense of genetically homogeneous populations—do not exist in the human species.

4. There are obvious physical differences between populations living in different geographic areas of the world, in their average appearance. Many of these differences have a genetic component.

   Most often the latter consist in differences in the frequency of the same hereditary characters.

5. Different classifications of mankind into major stocks, and of those into more restricted categories (races, which are groups of populations, or single populations) have been proposed on the basis of hereditary physical traits. Nearly all classifications recognize at least three major stocks.

Since the pattern of geographic variation of the characteristics used in racial classification is a complex one, and since this pattern does not present any major discontinuity, these classifications, whatever they are, cannot claim to classify mankind into clear-cut categories; moreover, on account of the complexities of human history, it is difficult to determine the place of certain groups within these racial classifications, in particular that of certain intermediate populations.

Many anthropologists, while stressing the importance of human variation, believe that the scientific interest of these classifications is limited, and even that they carry the risk of inviting abusive generalizations.

Differences between individuals within a race or within a population are often greater than the average differences between races or populations.

Some of the variable distinctive traits which are generally chosen as criteria to characterize a race are either independently inherited or show only varying degrees of association between them within each population. Therefore, the combination of these traits in most individuals does not correspond to the typological racial characterization.

6. In man as well as in animals, the genetic composition of each population is subject to the modifying influence of diverse factors: natural selection, tending towards adaptation to the environment, fortuitous mutations which lead to modifications of the molecules of desoxyribonucleic acid which determine he-

redity, or random modifications in the frequency of qualitative hereditary characters, to an extent dependent on the patterns of mating and the size of populations.

Certain physical characters have a universal biological value for the survival of the human species, irrespective of the environment. The differences on which racial classifications are based do not affect these characters and, therefore, it is not possible from the biological point of view to speak in any way whatsoever of a general inferiority or superiority of this or that race.

7. Human evolution presents attributes of capital importance which are specific to the species.

The human species, which is now spread over the whole world, has a past rich in migrations, in territorial expansions and contractions.

As a consequence, general adaptability to the most diverse environments is in man more pronounced than his adaptations to specific environments.

For long millennia, progress made by man, in any field, seems to have been increasingly, if not exclusively, based on culture and the transmission of cultural achievements and not on the transmission of genetic endowment. This implies a modification in the role of natural selection in man today.

On account of the mobility of human populations and of social factors, mating between members of different human groups, which tend to mitigate the differentiations acquired, has played a much more important role in human history than in that of animals. The history of any human population, or of any human race, is rich in instances of hybridization and those tend to become more and more numerous.

For man, the obstacles to interbreeding are geographical as well as social and cultural.

8. At all times, the hereditary characteristics of the human populations are in dynamic equilibrium as a result of this interbreeding and of the differentiation mechanisms which were mentioned before. As entities defined by sets of distinctive traits, human races are at any time in a process of emergence and dissolution.

Human races in general present a far less clear-cut characterization than many animal races and they cannot be compared at all to races of domestic animals, these being the result of heightened selection for special purposes.

9. It has never been proved that interbreeding has biological disadvantages for mankind as a whole.

On the contrary, it contributes to the maintenance of biological ties between human groups and thus to the unity of the species in its diversity.

The biological consequences of a marriage depend only on the individual genetic make-up of the couple and not on their race.

Therefore, no biological justification exists for prohibiting intermarriage between persons of different races, or for advising against it on racial grounds.

10. Man since his origin has at his disposal ever more efficient cultural means of nongenetic adaptation.

11. Those cultural factors which break social and geographic barriers enlarge the size of the breeding populations and so act upon their genetic structure by diminishing the random fluctuations (genetic drift).

12. As a rule, the major stocks extend over vast territories encompassing many diverse populations which differ in language, economy, culture, etc.

There is no national, religious, geographic, linguistic or cultural group which constitutes a race *ipso facto*; the concept of race is purely biological.

However, human beings who speak the same language and share the same culture have a tendency to intermarry, and often there is as a result a certain degree of coincidence between physical traits on the one hand, and linguistic and cultural traits on the other. But there is no known causal nexus between these and therefore it is not justifiable to attribute cultural characteristics to the influence of the genetic inheritance.

13. Most racial classifications of mankind do not include mental traits or attributes as a taxonomic criterion.

Heredity may have an influence in the variability shown by individuals within a given population in their responses to the psychological tests currently applied.

However, no difference has ever been detected convincingly in the hereditary endowments of human groups in regard to what is measured by these tests. On the other hand, ample evidence attests to the influence of physical, cultural and social environment on differences in response to these tests.

The study of this question is hampered by the very great difficulty of determining what part heredity plays in the average differences observed in so-called tests of over-all intelligence between populations of different cultures.

The genetic capacity for intellectual development, like certain major anatomical traits peculiar to the species, is one of the biological traits essential for its survival in any natural or social environment.

The peoples of the world today appear to possess equal biological potentialities for attaining any

civilizational level. Differences in the achievements of different peoples must be attributed solely to their cultural history.

Certain psychological traits are at times attributed to particular peoples. Whether or not such assertions are valid, we do not find any basis for ascribing such traits to hereditary factors, until proof to the contrary is given.

Neither in the field of hereditary potentialities concerning the over-all intelligence and the capacity for cultural development, nor in that of physical traits, is there any justification for the concept of 'inferior' and 'superior' races.

The biological data given above stand in open contradiction to the tenets of racism. Racist theories can in no way pretend to have any scientific foundation and the anthropologists should endeavour to prevent the results of their researches from being used in such a biased way that they would serve non-scientific ends.

Moscow, 18 August 1964.

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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 395

RICHARD PERRY LOVING, *et ux.*,

Appellants,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF OF N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

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IN THE

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Appellants,

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ON APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF OF N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE*

Interest of the *Amicus Curiae*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. is a non-profit membership corporation, incorporated under the laws of the State of New York in 1940. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race or color who are unable, on account of poverty, to employ and engage legal aid on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc. is independent of other organizations and is supported by contributions of funds from the public.

The Fund has litigated a great many cases involving the civil rights of Negroes which have sought to eliminate racial segregation and discrimination.[1] One of those cases was *McLaughlin* v. *Florida*, 379 U.S. 184, a case which, as we shall submit below, has an important bearing on the present litigation. The Fund consistent with its opposition to all forms of racial discrimination supports appellants' arguments that Virginia's laws punishing interracial marriage violate the Constitution. The parties have consented to the filing of an *amicus curiae* brief by the N.A.A.C.P. Legal Defense and Educational Fund, Inc. and copies of their letters of consent will be submitted to the Clerk with this brief.

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[1] Some of the cases in which the N.A.A.C.P. Legal Defense and Educational Fund, Inc. has opposed racial discrimination in recent years are cases involving schools (*Brown* v. *Board of Education*, 347 U.S. 483; *Cooper* v. *Aaron*, 358 U.S. 1; *Goss* v. *Board of Education*, 373 U.S. 683; *Bradley* v. *School Board*, 382 U.S. 103; *Rogers* v. *Paul*, 382 U.S. 198); public parks (*Mayor and City Council of Baltimore* v. *Dawson*, 350 U.S. 877; *Holmes* v. *Atlanta*, 350 U.S. 879; *Wright* v. *Georgia*, 373 U.S. 284; *Watson* v. *Memphis*, 373 U.S. 526; *Evans* v. *Newton*, 382 U.S. 296); voting (*Anderson* v. *Martin*, 375 U.S. 399); transportation facilities (*Gayle* v. *Browder*, 352 U.S. 903; *Boynton* v. *Virginia*, 364 U.S. 454; *Bailey* v. *Patterson*, 369 U.S. 41; *Turner* v. *Memphis*, 369 U.S. 350; *Abernathy* v. *Alabama*, 380 U.S. 447); restaurants (*Garner* v. *Louisiana*, 368 U.S. 157; *Peterson* v. *City of Greenville*, 373 U.S. 244; *Gober* v. *City of Birmingham*, 373 U.S. 374; *Bell* v. *Maryland*, 378 U.S. 226; *Bouie* v. *City of Columbia*, 378 U.S. 347; *Barr* v. *City of Columbia*, 378 U.S. 146; *Hamm* v. *Rock Hill*, 379 U.S. 306; *Georgia* v. *Rachel*, 384 U.S. 780); the right of peaceable assembly (*Edwards* v. *South Carolina*, 372 U.S. 229; *Fields* v. *South Carolina*, 375 U.S. 44; *Henry* v. *Rock Hill*, 376 U.S. 776); jury discrimination (*Coleman* v. *Alabama*, 377 U.S. 129); discriminatory treatment of a witness (*Hamilton* v. *Alabama*, 376 U.S. 650), and athletic contests (*State Athletic Commission* v. *Dorsey*, 359 U.S. 533).

Argument

Appellants were convicted of violating Virginia Code Section 20-58, and Virginia's highest court has rejected their objections that the statute violates their rights under the Constitution of the United States. Section 20-58 is one of several Virginia laws which prohibit marriages between white persons and colored persons.[2] It provides:

> §20-58. Leaving State to evade law.—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in §20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage.

The Supreme Court of Appeals of Virginia, in the opinion below, found "no sound judicial reason" (R. 25), to depart from its prior decision upholding the law forbidding interracial marriage against a federal constitutional challenge. *Naim* v. *Naim,* 197 Va. 80, 87 S.E.2d 749 (1955), *judg. vacated,* 350 U.S. 891 (1955), *judg. reinstated,* 197 Va. 734, 90 S.E.2d 849 (1956), *motion to recall mandate denied,* 350 U.S. 985 (1956) (case "devoid of a properly presented federal question"). In *Naim* v. *Naim, supra,* the Virginia court said that the purpose of the state's laws against

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[2] Va. Code §20-54 prohibits interracial marriage in the State. Section 20-57 provides that marriages between white and colored persons are "absolutely void without any decree of divorce or other legal process." Section 20-59 makes inter-marriage a felony punishable by confinement in the penitentiary for not less than one nor more than five years. Section 20-60 provides that any person performing a marriage ceremony between a white person and a colored person shall forfeit two hundred dollars.

intermarriage was "to preserve the racial integrity of its citizens" and so that the state "shall not have a mongrel breed of citizens" (87 S.E.2d at 756), and that: "If preservation of racial integrity is legal, then racial classification to effect that end is not presumed to be arbitrary" (87 S.E.2d at 755). Appellants argued in the courts below that *Naim* v. *Naim, supra,* should not be followed because it was based upon precedents—particularly *Plessy* v. *Ferguson,* 163 U.S. 537, and *Pace* v. *Alabama,* 106 U.S. 583—which had been overruled. The court below rejected these arguments, and asserted that *McLaughlin* v. *Florida,* 379 U.S. 184, which appellants relied on, "detracted not one bit from the position asserted in the *Naim* opinion" (R. 24). The court thought that none of the many decisions invalidating racial laws under the Fourteenth Amendment[3] required invalidation of the law punishing interracial marriage because of "an overriding state interest in the institution of marriage" (R. 24). We submit that the laws forbidding and punishing marriages between white persons and Negroes violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

Virginia Code §20-58, on its face and as applied in this case, makes a person's race the test of whether his conduct is criminal. No penalty is provided for persons of the same race who engage in the conduct mentioned in the section—i.e., leaving the state for the purpose of being married, with the intention of returning, being married out of the state, and afterwards returning to and residing in the state cohabiting as man and wife. The essence of the law is racial, and race is the test of criminality. It is obvious, and doubtless would be conceded by the State,

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[3] See, e.g., cases collected in note 1, *supra,* and see text *infra,* p. 6.

that appellants' conduct would be entirely lawful under Virginia law had they both been white, or both Negroes.

We urge that the issue of the invalidity of this law may be disposed of on this ground and without reference to other possible formulations of the issue. As Mr. Justice Stewart, joined by Mr. Justice Douglas, wrote concurring in *McLaughlin* v. *Florida,* 379 U.S. 185, 198:

> . . . I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. * * * And I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se.*

In *McLaughlin, supra,* the opinion of the Court, by Mr. Justice White, invalidated Florida's interracial cohabitation law "without reaching the question of the validity of the State's prohibition against interracial marriage" (379 U.S. at 195). The opinion of the Court in *McLaughlin, supra,* said that the Florida law was invalid "Because the section applies only to a white person and a Negro who commit the specified acts and because no couple other than one made up of a white and a Negro is subject to conviction upon proof of the elements comprising the offense it proscribes . . ." (379 U.S. at 184). The opinion said also that this racial classification "must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States." 379 U.S. at 192. The Court then inquired whether there was any statutory purpose which might justify the classification; found that there was none; and held the law invalid under the Equal Protection Clause.

We urge that racially discriminatory state laws are no longer only "constitutionally suspect" (*Bolling* v. *Sharpe*, 347 U.S. 497, 499) and merely subject to "rigid scrutiny" (*Korematsu* v. *United States*, 323 U.S. 214, 216). The decisions which have invalidated every state segregation law or practice to come before this Court establish that there can be no justification for such laws and that they are all invalid *per se*. *Strauder* v. *West Virginia*, 100 U.S. 303; *Buchanan* v. *Warley*, 245 U.S. 60; *Harmon* v. *Tyler*, 273 U.S. 668; *Smith* v. *Allwright*, 321 U.S. 649; *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192, 203; *Shelley* v. *Kraemer*, 334 U.S. 1; *Barrows* v. *Jackson*, 346 U.S. 249; *Brown* v. *Board of Education*, 347 U.S. 483; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U.S. 971; *Mayor and City Council of Baltimore* v. *Dawson*, 350 U.S. 877; *Holmes* v. *Atlanta*, 350 U.S. 879; *Gayle* v. *Browder*, 352 U.S. 903; *Cooper* v. *Aaron*, 358 U.S. 1; *New Orleans City Park Improv. Asso.* v. *Detiege*, 358 U.S. 54; *Evers* v. *Dwyer*, 358 U.S. 202; *State Athletic Commission* v. *Dorsey*, 359 U.S. 533; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Bailey* v. *Patterson*, 369 U.S. 41; *Turner* v. *Memphis*, 369 U.S. 350; *Johnson* v. *Virginia*, 373 U.S. 61; *Peterson* v. *City of Greenville*, 373 U.S. 244; *Lombard* v. *Louisiana*, 373 U.S. 267; *Wright* v. *Georgia*, 373 U.S. 284; *Watson* v. *Memphis*, 373 U.S. 526; *Goss* v. *Board of Education*, 373 U.S. 683; *Anderson* v. *Martin*, 375 U.S. 399; *Bradley* v. *School Board*, 382 U.S. 103; *Evans* v. *Newton*, 382 U.S. 296. We think the teaching of these cases, viewed against their varied circumstances and against the multitude of supposed justifications for segregation which have been offered and rejected, is simply that the Equal Procetion Clause strikes down all forms of racial segregation laws. It is beyond the power of the state to compel segregation whatever the context and whatever the asserted justification. As Mr. Justice Stewart

wrote in 1963, " . . . our Constitution presupposes that men are created equal, and that therefore racial differences cannot provide a valid basis for governmental action." *Abington School District* v. *Schempp*, 374 U.S. 203, 317 (dissenting opinion).

Most especially in the area of criminal justice must the law be administered "without reference to consideration based on race." Cf. *Gibson* v. *Mississippi*, 162 U.S. 565, 591. To send a person to prison because of the color of his skin would make a mockery of the constitutional promise of equal protection of the laws. The Fourteenth Amendment overrides any State choice to inflict penal sanctions based on race or color. Such a choice is simply denied to the States. The "pervading purpose" of the Thirteenth, Fourteenth and Fifteenth Amendments was to protect Negroes against discrimination. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 71. The Fourteenth Amendment was adopted to declare " . . . that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color." *Strauder* v. *West Virginia*, 100 U.S. 303, 307.

Professor Charles L. Black, Jr. has cogently stated that the application of the Equal Protection Clause to cases of racial discrimination calls for no inquiry about whether such discriminations are "reasonable." Professor Black wrote:

> But the whole tragic background of the fourteenth amendment forbids the feedback infection of its central purpose with the necessary qualifications that have attached themselves to its broader and so largely acci-

dental radiations. It may have been intended that "equal protection" go forth into wider fields than the racial. But history puts it entirely out of doubt that the chief and all-dominating purpose was to ensure equal protection for the Negro. And this intent can hardly be given the self-defeating qualification that necessity has written on equal protection as applied to carbonic gas. If it is, then "equal protection" for the Negro means "equality until a tenable reason for inequality is proferred." On this view, Negroes may hold property, sign wills, marry, testify in court, walk the streets, go to (even segregated) school, ride public transportation, and so on, only in the event that no reason, not clearly untenable, can be assigned by a state legislature for their not being permitted to do these things. That cannot have been what all the noise was about in 1866.

What the fourteenth amendment, in its historical setting, must be read to say is that the Negro is to enjoy equal protection of the laws, and that the fact of his being a Negro is not to be taken to be a good enough reason for denying him this equality, however, "reasonable" that might seem to some people. All possible arguments, however convincing, for discriminating against the Negro, were finally rejected by the fourteenth amendment.[4]

However, if it is thought to be necessary to inquire whether Virginia's law serves any legitimate interest of the State which can justify the racial classification, any lingering doubt about the invalidity of the law ought to be readily dispelled.

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[4] Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L. J. 421, 423 (1960).

The court below asserts "an overriding state interest in the institution of marriage" (R. 24). Surely the States have traditionally exercised considerable control over the institution and incidents of marriage. But state legislative power over marriages is not omnipotent. State power over marriages, like "Legislative control of municipalities," must of necessity lie "within the scope of relevant limitations imposed by the United States Constitution." Cf. *Gomillion* v. *Lightfoot,* 364 U.S. 339, 344-345. The right to marry is a protected liberty under the Fourteenth Amendment, and is one of the "basic civil rights of man." *Skinner* v. *Oklahoma,* 316 U.S. 535, 541. In *Meyer* v. *Nebraska,* 262 U.S. 390, 399, this Court declared:

> While this court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individuals to . . . marry, establish a home and bring up children. . . .

The several majority opinions in *Griswold* v. *Connecticut,* 381 U.S. 479, demonstrate that a variety of constitutional doctrines have been thought to limit the power of the states over the marriage relationship.

Virginia's principal apparent claimed justification for the law against interracial marriage is that stated in *Naim* v. *Naim,* 197 Va. 80, 87 S.E.2d 749, 756, the purpose to "preserve the racial integrity of its citizens," and prevent what it calls "a mongrel breed of citizens". The state's justification thus turns on the amalgam of superstition, mythology, ignorance and pseudo-scientific nonsense sum-

moned up to support the theories of white supermacy and racial "purity." [5]

Clearly, this basis for anti-marriage laws rests on theories long deemed nonsensical throughout the world's community of natural scientists. The distinguished American geneticist Theodosius Dobzhansky has said:

> The idea of a pure race is not even a legitimate abstraction; it is a subterfuge used to cloak one's ignorance of the phenomenon of racial variation. (Dobzhansky, "The Race Concept in Biology," *The Scientific Monthly,* LII (Feb. 1941), pp. 161-165.)

And see the many scientific authorities rejecting the "pure race" idea collected in Weinberger, *"A Reappraisal of the*

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[5] Such nonsensical material pervades the legal opinions upholding laws against intermarriage. See, for example, *State* v. *Jackson,* 80 Mo. 175, 179 (1883):

> "It is stated as a well authenticated fact that if the issue of a black man and a white woman and a white man and a black woman intermarry, they cannot possibly have any progeny, and such a fact sufficiently justifies those laws which forbid the intermarriage of blacks and whites. . . ."

See also, *Scott* v. *Georgia,* 39 Ga. 321, 323 (1869):

> "The amalgamation of the races is not only unnatural, but is always productive of deplorable results. Our daily observations show us, that the offspring of these unnatural connections are generally sick and effeminate, and that they are inferior in physical developments and strength to the full-blood of either race. . . . Such connections never elevate the *inferior* race to the position of *superior,* but they bring down the *superior* to that of the *inferior.* They are productive of evil, and evil only, without any corresponding good." (Emphasis added.)

It is notable that even the word "miscegenation," now widely used in legal literature to refer to intermarriage, was reportedly invented as a hoax in an 1864 political pamphlet connected with a presidential campaign. See discussion in Montague, MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE, 400 (4th ed. 1964).

Constitutionality of Miscegenation Statutes," 42 CORNELL L. Q. 208, 217, n. 68.[6]

The 1952 *UNESCO Statement On The Nature of Race,*[7] prepared by distinguished natural scientists from around the world, concludes:

> There is no evidence for the existence of so-called "pure" races. Skeletal remains provide the basis of our limited knowledge about earlier races. In regard to race mixture, the evidence points to the fact that human hybridization has been going on for an indefinite but considerable time. Indeed, one of the processes of race formation and race extinction or absorption is by means of hybridization between races. As there is no reliable evidence that disadvantageous effects are produced thereby, no biological justification exists for prohibiting intermarriage between persons of different races.

Similarly, other pseudoscientific props for racism, including the notions of biological disadvantages of race mixture, and the assumption that cultural levels depend on racial factors, are completely undermined by modern scientific knowledge.[8] For example, the 1952 UNESCO Statement, *supra,* concludes by saying:

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[6] See also Note, 58 YALE L. J. 472 (1949).

[7] The full title is: "Statement on the Nature of Race and Race Differences—by Physical Anthropologists and Geneticists, September 1952," published by UNESCO. The statement, published in numerous publications by UNESCO is conveniently available in Appendix A of Montague, *op. cit.,* 361 et seq.

[8] The importance of environmental factors in determining cultural levels was noted by the court in *Perez* v. *Lippold,* 32 Cal. 2d 711, 198 P.2d 17, 24-25 (1948). Major contemporary research demonstrating the absence of any relation between race and cultural achievement is found in Beals and Hoijer, AN INTRODUCTION TO ANTHROPOLOGY, 195-198 (1953); Hankins, THE RACIAL BASIS OF CIVILIZATION 367-371 (1926); Kroeber,

9. We have thought it worth while to set out in a formal manner what is at present scientifically established concerning individual and group differences.

(1) In matters of race, the only characteristics which anthropologists have so far been able to use effectively as a basis for classification are physical (anatomical and physiological).

(2) Available scientific knowledge provides no basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development.

(3) Some biological differences between human beings within a single race may be as great or greater than the same biological differences between races.

(4) Vast social changes have occurred that have not been connected in any way with changes in racial type. Historical and sociological studies thus support the view that genetic differences are of little significance in determining the social and cultural differences between different groups of men.

(5) There is no evidence that race mixture produces disadvantageous results from a biological point of view. The social results of race mixture whether for good or ill, can generally be traced to social factors.

And see, generally, Montague, *Man's Most Dangerous Myth: The Fallacy of Race* (4th ed. 1964), for a noted anthropologist's full discussion of the most recent scientific evidence and research on race.

ANTHROPOLOGY 190-192 (1958); Ashley Montague, AN INTRODUCTION TO PHYSICAL ANTHROPOLOGY 352-381 (1951); Yerkes, "Psychological Examining in the U. S. Army," 15 MEM. NAT. ACAD. SCI. 705-742 (1921).

Actually, the laws against interracial marriage grew out of the system of slavery and were based on race prejudices and notions of Negro inferiority used to justify slavery, and later segregation. Chief Justice Taney said in *Scott* v. *Sandford*, 19 How. (60 U.S.) 393, 409 that laws against intermarriage:

> . . . show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the persons who joined them in marriage. And no distinction in this respect was made between the free negro or mulatto and the slave, but this stigma, of the deepest degradation, was fixed upon the whole race.

The court below disparaged the scientific texts cited to it by appellants as an invitation to "judicial legislation" (R. 25). But it is the state which must justify its racial classification. And the state can no more justify its racial classification here by reference to a nonsensical theory of pure races and racial superiority than it could impose some special disability on some citizens on a theory of witchcraft, or restrict their liberty of movement on a claim that the earth is flat.

The sum of the other justifications for the laws against interracial marriage amount to little more than a claim that they promote segregation. They are exemplified by the opinion of the trial judge in appellants' case who declared:

> "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate con-

> tinents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix (R. 16).

Such a theory could, of course, support any kind of discriminatory practice which the States have ever devised; and, indeed, it seems to suggest discriminations never yet attempted in this country. As an individual the Judge is entitled to entertain his private theology. But the Fourteenth Amendment places it entirely beyond the power of the state courts to implement racial discrimination, whatever the rationale.

The court below thought it important to mention its statement in *Naim* v. *Naim*, 197 Va. 80, 87 S.E.2d 749, 753, that "more than one-half of the states then [1955] had miscegenation statutes" (R. 21). That statement is, of course, no longer true. Thirteen states have repealed their anti-marriage laws since 1951 (see Appendix I, *infra*). Laws prohibiting interracial marriages continue in the statute books of only 17 of the 50 states (see Appendix II, *infra*), and it is notable that all of these are southern and border states which had extensive segregation codes[9] prior to *Brown* v. *Board of Education*, 347 U.S. 483.

These laws, having only a racial character and purpose, are relics of the system of human slavery. They should be struck down for the same reasons this Court has invalidated all other segregation laws. As a result of these many decisions, laws against interracial marriage are among the last of such racial laws with any sort of claim to viability. But they are the weakest, not the strongest, of the segregation laws. They intrude a racist dogma into

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[9] The segregation codes of the pre-Brown era are collected in Murray, STATES' LAWS ON RACE AND COLOR (1951).

the private and personal relationship of marriage. The state has no semblance of a rational claim of interest in such an intrusion. Virginia's laws punishing interracial marriage violate the Due Process and Equal Protection Clauses.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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APPENDIX I

STATES REPEALING LAWS AGAINST INTERRACIAL MARRIAGE, IN RECENT YEARS

1. *Arizona* (1962):	Laws 1962, ch. 14, §1, deleting a portion of Ariz. Rev. Stat. §25-101 (1956).
2. *California* (1959):	Stat. 1959, ch. 146, §1, at 2043, repealing Cal. Civ. Code §§60, 69 (1954).
3. *Colorado* (1957):	Colorado Laws 57, §1, at 334, repealing Colo. Rev. Stat. §§90-1-2, 90-1-3 (1953).
4. *Idaho* (1959):	Laws 1959, ch. 44, §1, at 89, deleting Idaho Code Ann. §32-206 (1947).
5. *Indiana* (1965):	Acts 1965, No. 1039, repealing Ind. Ann. Stat. §44-104 (Burns, 1952).
6. *Montana* (1953):	Laws 1953, ch. 4, sec. I, repealing Laws 1909, ch. 49, secs. 1-5.
7. *Nebraska* (1963):	Neb. Sess. Laws, at 736 (1963), repealing Rev. Stat. of Neb. §§42-103, 42-328 (1948).
8. *Nevada* (1959):	Nev. Stat. 1959, at 216, 217, repealing Nev. Rev. Stat. tit. 11, ch. 122, 180 (1957).

9. *North Dakota* (1955):	N.D. Stat. 1955, ch. 246, §1, repealing N.D. Code §14-03-04.
10. *Oregon* (1951):	O.R.S. §106.210 (1963), repealing Ore. Code Law Ann. §§23-1010, 63-102.
11. *South Dakota* (1957):	S.D. Sess. Laws 1957; ch. 38, repealing S.D. Code §14.990 (1939).
12. *Utah* (1963):	Sess. Laws 1963, ch. 43, repealing Utah Stat. §30-1-2 (1953).
13. *Wyoming* (1965):	Acts 1965, No. 3; repealing Wyo. Stat. §§20-18, 19.

APPENDIX II

STATES AT PRESENT PROHIBITING INTERRACIAL MARRIAGES (PENALTIES FOR INFRACTIONS ARE INDICATED)

1. *Alabama*: Ala. Const. §102; Ala. Code, Tit. 14, §360 (1958); 2-7 imprisonment (idem.).
2. *Arkansas*: Ark Stat. §55-104 (1947); 1 year imprisonment and/or $250 fine (Ark. Stat. §41-106).
3. *Delaware*: Del. Code Ann., Tit. 13, §101 (1953); $100 fine in default of which imprisonment for not more than 30 days (Del. Code Ann., Tit. 13, §102).
4. *Florida*: Fla. Const. art. XVI, §24; Florida Stat. §741.11 (1961); maximum 10 years imprisonment and/or maximum fine of $1,000 (Fla. Stat. §741.12).
5. *Georgia*: Ga. Code Ann., §53-106 (1933); 1 to 2 years imprisonment (Ga. Code Ann. 53-9903).
6. *Kentucky*: Ky. Rev. Stat. §402.020 (1943); fine of $500 to $1000 and if violation continued after conviction, imprisonment of 3 to 12 months (K.R.S. §402.990).
7. *Louisiana*: La. Civil Code Art. 94 (Dart. 1945); 5 years imprisonment (La. Rev. Stat. Ch. 14, §79).
8. *Maryland*: Md. Ann. Code Art. 27, §398 (1957); imprisonment from 18 months to ten years (idem.).
9. *Mississippi*: Miss. Const. art. 14, §263; Miss. Code Ann. §459 (1942); Imprisonment up to 10 years (Miss. Code Ann. §2000, 1960).
10. *Missouri*: Mo. Rev. Stat. §451.020 (Supp. 1966); 2 years in state penitentiary; and/or a fine of not less than $100, and/or imprisonment in county jail for not less than 3 months (Mo. Rev. Stat. §563.240).

11. *North Carolina*: N.C. Const. art. XIV, §8; N.C. Gen. Stat. §51-3 (1953); 4 months to 10 years imprisonment (N.C. Gen. Stat. §14-181).

12. *Oklahoma*: Okla. Stat., Tit. 43, §12 (1961); 1 to five years and up to $500 fine (Okla. Stat., Tit. 43, §13).

13. *South Carolina*: S.C. Const. art. 3, §34; S.C. Code §20-7 (1952); imprisonment for not less than 12 months, and/or fine of not less than $500 (idem.).

14. *Tennessee*: Tenn. Const. art. (11), §14; Tenn. Code Ann. §36-402 (1956); 1 to 5 years imprisonment, or, on recommendation of jury, fine and imprisonment in county jail (Tenn. Code Ann. §36-403).

15. *Texas*: Tex. Rev. Civ. Stat. art. 4607 (1948); 2 to 5 years imprisonment (Tex. Penal Code art. 492).

16. *Virginia*: Va. Code Ann. §20-54 (1953); 1 to 5 years (Va. Code Ann. §20-59).

17. *West Virginia*: W. Va. Code Ann. §4697.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 395

LOVING, *et ux.*,

Appellants,

v.

COMMONWEALTH OF VIRGINIA

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE*

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Statement of Interest

This brief *amicus curiae* is being filed by the National Association for the Advancement of Colored People (NAACP) with consent of the parties as provided under Rule 42 of the Rules of this Court.

The NAACP is a New York membership corporation with approximately 1500 local affiliates in the 50 states and the District of Columbia. The basic aims and purposes of the organization are to secure full and equal citizenship rights for Negroes without restrictions, burdens, limitations or barriers based upon race or color. The Negro in the United States is engaged in what often seems to be a never-ending struggle against laws, customs, practices, usages and opinion relegating him to an inferior status. Incident to this concept of his inferiority are state statutes,

such as those involved here, which deny to Negro and white persons the personal and individual right and freedom to marry each other.

Forty of the fifty states at one time or another prohibited Negroes from marrying whites. Today seventeen states prohibit various forms of interracial marriage.[1] In the main, repeal of these laws occurred in the northern states immediately before and after the Civil War, but Pennsylvania repealed its prohibition in 1780 while Indiana and Wyoming retained their proscription until 1965. The western states, with their proportionately higher population of Orientals, repealed their statutes in the post World War II period during which a new attitude was developed towards Japanese and Nisei.[2]

The statutes are neither uniform in respect to coverage of the racial groups affected, nor in defining those factors which bring individuals within their reach.[3] Thus, in Mississippi, Mongolian-white marriages are illegal and void,

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[1] Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia.

These are the same 17 states which (together with the District of Columbia) by statute required segregation in education prior to the 1954 Court ruling in Brown v. Board of Education, 347 U.S. 483.

[2] Those states which at one time had anti-miscegenation statutes, together with the dates of repeal are: Arizona, 1962; California, 1959; Colorado, 1957; Idaho, 1959; Indiana, 1965; Iowa, 1851; Kansas, 1857; Maine, 1883; Massachusetts, 1840; Michigan, 1883; Montana, 1953; Nebraska, 1963; Nevada, 1959; New Mexico, 1866; North Dakota, 1955; Ohio, 1877; Oregon, 1951; Pennsylvania, 1780; Rhode Island, 1881; South Dakota, 1957; Utah, 1963; Washington, 1867; Wyoming, 1965. (The repeals by Kansas, New Mexico and Washington occurred while they were territories.)

There is no federal policy against intermarriage. None of the islands or possessions has such statutes. Apparently Guam at one time had such prohibitions but these were abolished in 1951. (Public Law 19, First Guam Legislature.)

[3] See Appendix.

while in North Carolina they are permitted. In Arkansas, Florida and Oklahoma, Negro-white marriages are void. In Arkansas, a Negro is defined as "any person who has in his or her veins any negro blood whatever"; in Florida, one ceases to be a Negro when he has less than "one-eighth of . . . African or negro blood"[4]; and in Oklahoma, anyone not of "African descent" is miraculously transmuted into a member of the white race. Mongolians, Malays, Chinese, Japanese, Indiana, Cherokees, Half-breeds, and Mestizos are barred from marrying white persons by some of the statutes, but all bar the marriage of Negro and white persons. Anti-miscegenation statutes have been upheld by the highest court of ten of the seventeen states and enforced in the lower courts in the other seven states. In California,[6] Nevada,[7] and Arizona [8] the statutory prohibition was declared unconstitutional, and subsequently the laws were repealed.[9]

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[4] See Appendix.

[5] Green v. Alabama, 58 Ala. 190 (1877); Dodson v. State, 61 Ark. 57, 31 S. W. 977 (1895); McLaughlin v. Florida, 153 So. 2d I (1963); Scott v. Georgia, 39 Ga. 321 (1869); Miller v. Lucks, 203 Miss. 824, 36 So. 2d 140 (1948); State v. Jackson, 80 Mo. 175 (1883); State v. Kennedy, 76 N. C. 251 (1877); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924); Lonas v. State, 50 Tenn. 287 (1871); Naim v. Naim, 197 Va. 80, 87 S. E. 2d 749, *remanded*, 350 U. S. 891 (1955), *aff'd*, 197 Va. 734, 90 S. E. 2d 849, *app. dismissed*, 350 U. S. 985 (1956).

[6] Perez v. Sharpe, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

[7] Bridges v. Brown, Nevada District Court, Reno (December 10, 1958, not reported).

[8] Ogama v. O'Neill, Arizona Superior Court, Tucson (December 23, 1959, not reported).

[9] California 1959, Nevada 1959, Arizona 1962.

The ethnic minorities who are barred from marrying persons of their choice understandably find these statutes repugnant. As Dr. DuBois said:

> But the impudent and vicious demand that all colored folk shall write themselves down as brutes by a general assertion of their unfitness to marry other decent folk, is a nightmare.[10]

Substantial injury to more tangible interests is, moreover, often a factor to be weighed. In addition to the prohibition of marriage, criminal penalties are usually prescribed,[11] and the offspring of such marriage are declared illegitimate. Other individual rights,[12] such as the marital privilege available to a defendant in a criminal prosecution, and the right to receive property bequeathed by will, or passing under the laws of intestacy, are affected.

No authoritative statistics are available as to the number of interracial marriages in the United States. However, one may empirically observe that interracial marriage is far from unknown. While, of course, every mixed couple seen in the street and in public places is not married, some of them are, and we may assume that most of those seen with children are a family.

It is estimated that there were 25,000 Negro-white marriages 30 years ago and that there are 50,000 in the nation today. There have been some larger and some smaller estimates, but to establish an accurate figure is impossible. An average of the opinions of those who have ventured to speculate is that there are 50,000 Negro-white marriages in the United States.

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[10] DuBois, 21 *Crisis* 106 (Editorial 1920).

[11] See Appendix.

[12] See Weinberger, A Reappraisal of the Constitutionality of Miscegenation Statutes, 42 *Cornell L. Q.* 208 (1957), revised to November 1, 1963 as Appendix G in Montagu, *Man's Most Dangerous Myth: The Fallacy of Race* (4th Ed.) 402 (1964).

However, all these estimates are limited to acknowledged Negro-white marriages. None of them take into account the marriages of the substantial number of Negroes who have passed into the white community, severing all ties with Negro friends and relatives, and are known as white.[13]

It is the burden of this brief to establish that there is no rational or scientific basis upon which a statutory prohibition against marriage based on race or color alone can be justified as furthering a valid legislative purpose. The right to marry is a civil right, and it is, therefore, within the purview of the equal protection clause of the Fourteenth Amendment. The Court, in 1923, though anti-miscegenation laws were not at issue, said: "Without doubt, it [the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children."[14]

While there is apparent equal treatment of the different races and ethnic groups in these anti miscegenation statutes, it is self-evident, even if the doctrine of "separate but equal" were still valid, that it cannot apply in the marital relationship. Nor can it be said that when two persons are denied the right to marry because of race that they may find equal opportunity within their own group. The choice of a spouse is a subjective act, the act of an individual and not that of a race or group. It follows that any legislative classification that prohibits persons from marrying each other

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[13] Dr. Robert P. Stuckert in 1958 estimated that 15,550 Negroes per year passed into the white population during 1941-1950, and that in the preceding five years the annual mean passing rate was 4,270. (Stuckert, African Ancestry of the White American Population, 58 *Ohio J. Sci.* 155 (1958). On this point see also Hart, Selective Migration as a Factor in Child Welfare in the United States, with Special Reference to Iowa, 1 *Iowa Univ. Studies* (1921)); Eckhard, How Many Negroes "Pass"? 52 *Am. J. Soc.* 498 (1947); Weinberger, "Interracial Marriage—Its Statutory Prohibition, Genetic Import, and Incidence, 2 *J. Sex Res.* 157 (1966); and Weinberger, Interracial Marriage in the U.S.A., 74 *Crisis* (March 1967).

[14] Meyer v. Nebraska, 262 U. S. 390, 399 (1923).

must, therefore, relate to individuals and be based upon personal, not group, characteristics.

Negroes cannot be considered to have obtained equal rights or to have gained full freedom as full-fledged citizens of the United States until they are free to make the individual decision as to whom they will marry without legislative interference or proscriptions based solely on the accident of their color. It is to assert this individual right to freedom and full-fledged citizenship that the NAACP is filing this brief. The basic purpose of the Fourteenth Amendment to bar all differentiation as between Negro and white persons will be frustrated as long as the instant statute and its counterparts in other states is found to be consistent with the federal Constitution and national policy.

ARGUMENT

The Genetic Import of Interracial Marriage is Conclusive Proof that its Prohibition Cannot Be a Vital Legislative Objective

Statutes prohibiting marriage on grounds other than racial ones have a place in society. Prohibition of marriages of feeble-minded persons or of persons with communicable diseases are not uncommon. Each of these is supported by demonstrable scientific knowledge that such marriages present a potential danger to society through physically or mentally ill offspring. In these statutes, the requirements of a valid legislative objective and a connection between the legislation and the ends sought have been met.

In support of the statutes prohibiting interracial marriage, the same argument is offered. Could it be demonstrated that biologically inferior children would be the result of such marriages, the need for a rational legislative policy would be satisfied. While some courts have at-

tempted to show that such prohibitions are grounded in reason, ordinarily they simply repeat outmoded and unscientific genetical conclusions. Thus a Georgia court said:

> The amalgamation of the races is not only unnatural, but it is always productive of deplorable results. Our daily observation shows us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength, to the full blood of either race.[15]

That was in 1869, but despite Mendel and the twentieth century science of genetics, in 1955 the Virginia Supreme Court found the legislative object to be "to preserve the racial integrity of . . . [the state's] citizens . . . [and] to regulate the marriage relation so that it will not have a mongrel breed of citizens." [16]

The rationale of the state courts is abhorrent to both science and jurisprudence. They adhere to and perpetuate three erroneous assumptions: (1) that "pure races" either exist in the present or have existed in the past; (2) that crossing between different racial groups results in biologically inferior offspring; (3) that cultural level is dependent upon racial attributes. Contemporary physical anthropology and human genetics disprove all three of these assumptions.

(1) The Idea of "Pure Races"

To speak of race "mixtures" or "mongrelization" is to imply that "pure races" either still exist or have existed in the past. Contemporary biological research and theory refute both of these implications. The idea of "pure" racial groups, either past or present, has long been aban-

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[15] Scott v. Georgia, 39 Ga. 321, 323 (1869).

[16] Naim v. Naim, 197 Va. 80, 89 (1955).

doned by modern biological and social science. As Professors L. C. Dunn and Th. Dobzhansky said:

> Race mixture has been going on during the whole of recorded history. Incontrovertible evidence from studies on fossil human remains shows that even in pre-history, at the very dawn of humanity, mixing of different stocks, at least occasionally, took place.[17]

The scientific position concerning the idea of "pure races" is contained in this statement by Dr. Dobzhansky:

> The idea of a pure race is not even a legitimate abstraction; it is a subterfuge used to cloak one's ignorance of the phenomenon of racial variation.[18]

The idea of "pure races" is refuted by paleontological and genetical studies of human evolution. All mankind is a member of a single species, *homo sapiens*. All known physical variations among men, therefore, continue to take place *within* species boundaries, not without. When considering human evolution and modern "races", we are not dealing with separate species. Interbreeding among human groups manifesting differences in physical attributes produces live, fertile offspring—the mark of membership in a single species. It has been established empirically that the offspring of mixed marriages are no less physically and psychologically sound than those where both parents are of the same race.[19]

Under the sponsorship of the United Nations Educational, Scientific and Cultural Organization (UNESCO), thirteen scientists representing physical anthropology and human genetics met in June 1951 to consider the prepara-

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[17] Dunn and Dobzhansky, *Heredity, Race and Society* 115 (1952).

[18] Dobzhansky, The Race Concept in Biology, 52 *Scientific Monthly* 161 (Feb. 1941).

[19] Reuter, *The Mulatto in the United States* 117 et seq. (1918).

tion of a statement which would effect a crystallization of scientific theory and opinion on matters of race and race differences. An additional seventy renowned scientists contributed to its final form. The *Statement on the Nature of Race and Race Differences* was released by UNESCO in September of 1952.

The *Statement* at Article 7 said concerning "pure races":

> *There is no evidence for the existence of so-called "pure" races.* Skeletal remains provide the basis of our limited knowledge about earlier races. In regard to race mixture, the evidence points to the fact that human hybridization has been going on for an indefinite but considerable time. Indeed, one of the processes of race formation and race extinction or absorption is by means of hybridization between races. *As there is no reliable evidence that disadvantageous effects are produced thereby, no biological justification exists for prohibiting intermarriage between persons of different races.* (Emphasis added)

That there is still popular opinion to the contrary is shown by an Associated Press dispatch from Bastrop, La., dated November 2, 1955, which read in part:

> The Morehouse Parish School Board has voted unanimously to discontinue use of a ninth-grade general science textbook [Science for Better Living] which some persons say "contains un-American ideas on the origin of races."
>
> . . . This passage was among those cited as objectionable:
>
> "Living things which belong to recognizable kinds, which are like in most physical traits, and which breed freely with each other, are said to belong to one species. All men on this earth belong to one species—homo sapiens."
>
> Persons who object to the book said this was a plain insinuation that races "breed freely with each other" and is a dangerous Socialistic trend of thought to instill into the younger generation.

(2) The Assumption That Race Crossing Results in Biologically Inferior Offspring

Ultimately, statutes prohibiting interracial marriage are a reflection of the popular but erroneous stereotype that such marriages give rise to biologically inferior offspring. The fact that the stereotype persists even when the weight of scientific evidence is against it testifies to its ideological rather than scientific character. Even those who are most vehement about the deleterious effect of intermarriage on offspring accept the inconsistent and equally fallacious belief that Negroes of outstanding distinction always owe their intellectuality to their partial white ancestry. The research and literature assessing the biological consequences of race crossing includes no indication of either disharmonious constitution [20] or hybrid vigor.[21] Independent evaluations of this literature tend to conclude that prohibitions against interracial marriage are primarily social and psychological and not biological.

(3) The Assumption That Cultural Level is Dependent Upon Racial Attributes

Statutes prohibiting interracial marriage commonly perpetuate another assumption that is totally inconsistent with valid knowledge pertaining to the relationship between race, progress, and cultural achievement. There is no evidence to sustain the contention that cultural level is dependent upon racial or biological attributes.

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[20] Stern, *Principles of Human Genetics* (1949). See especially Chapter 26, Genetic Aspects of Race Mixture.

[21] One should not overlook that human hybridization is random and not selective as with animals and plants. Also see Krauss, Race Crossing in Hawaii, 32 *J. Heredity* 371 (1941) and Chung, A Report on a Study of 180,000 Hawaiians for 11 Years, read at a conference of the New York Academy of Sciences on Feb. 11, 1965, to be published in its *1966 Annals.*

Race, in its scientific dimension, refers only to the biogenetic and physical attributes manifest by a specified population. It does not, under any circumstances, refer to culture (learned behavior), language, nationality, or religion. One of the fundamental axioms of both physical and cultural anthropology is that culture (behavior) is independent of race. Civilizations and cultural achievement are not based on genes or physical characteristics. There are no great cultural differences between white and Negro Americans. The sub-cultural differences of economic status, education, health, and family orientation are strata differences in both groups and not differences between Negroes and whites. The difference in family structure is that the majority of low income Negro families are matriarchal as the employability of Negro women far exceeds the opportunities for employment of Negro men. But this will change when economic discrimination is ended. Proof of this is found in the present conformance to what is accepted as the American norm in the professional and other high income classes. There are no known racial or biological barriers to the acquistion or creation of any cultural tradition, a fact amply demonstrated by the creation and dissemination of cultural innovations in the United States irrespective of the racial composition of the population.

The scientific material available at present does not justify the conclusion that inherited genetic or racial differences are a factor in producing the differences between cultures. Cultural and civilizational factors are transmitted by learning and education, not by the genes. In the Army Alpha Tests of World War I Negroes from the Northern states of Ohio, Illinois, Indiana and New York scored higher than white recruits from almost all the Southern states.[22] Similarly, the World War II rate of rejection for mental

[22] Yerkes (ed.), Psychological Examining in the United States Army, 15 *Mem. Nat'l Ac. Sci.* 690 (1921).

deficiency by the Selective Service System showed that while Negro illiteracy exceeded white illiteracy in the South, white illiteracy in the Southeast exceeded Negro illiteracy in the Northwest and the far West.[23] Dr. Otto Klineberg has corroborated these results by tests made on northern and southern Negro children.[24] Economic-socio-political factors and not race determine education and health. There are no racial monopolies on cultural achievement. Historical and comparative studies of human culture show that vast changes have taken place in the economic, political, and social institutions of a given society without any, or with little, change in the racial or genetic composition of the population concerned.

If the weight of the scientific evidence formerly prevalent justified the fear of biologically inferior offspring through intermarriage, those theories have been proven false. Legislative determination cannot reverse empirical fact. Constitutional construction cannot remain unchanged when orginally predicated upon a false premise.

The statutes are self-contradictory, containing within themselves certain permissible areas of miscegenistic marriage. Apparently, "scientific" thought varies from state to state. As has been shown, some legislators see no danger in white-Mongolian marriages, while others do. None, with the exception of North Carolina and Maryland, perceive any evidence of deterioration in the offspring of intermarriage between any of the races other than white. Even as to Negroes, the degree of Negro genes thought sufficient to cause contamination varies from state to state, and in the most absurd instance, Colorado (until 1957) prohibited in one part of the state interracial marriages which were

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[23] Ginzburg and Bray, *The Uneducated*, 43 (1953).

[24] Klineberg, Mental Testing of Racial and National Groups, Corrigan (ed.), *Scientific Aspects of the Race Problem* (1941).

permitted in another part of the state.[25] Equally genetically nonsensical is North Carolina's prohibiting marriage between a Cherokee Indian of Robeson County and a Negro, with no such restriction against Cherokees of other counties nor against Indians other than Cherokees regardless of their county.[26]

It is not scientifically possible to determine whether a person is "one-eighth Negro", "one-half Malay", or is one of the many varieties of fractionated racial memberships. Such terms as "half-breeds", "octaroons", "full-bloods", and the like, are misleading when used in anything but a fictional or social sense; for example, the popular expression that a person is "one-quarter Chinese" has no necessary biological or genetic meaning—it does mean, pragmatically, only that one of a set of grandparents of that person was *socially defined* as a person of Chinese ancestry. It carries no genetically meaningful import, for example, that one-quarter of the genes of that person are "Chinese". Genes are not known to be transmitted in any such predetermined or culturally labeled quantities. Every gene derived from a non-white ancestor does not necessarily relate to the racial characteristics of the individual. Many of these inherited genes do not distinguish the individual from one of entire white ancestry being simply genes common to all races. Concerning this, Professor Don J. Hager remarked:

> Laws prohibiting marriage between "whites and persons having one-eighth or more of Negro blood"

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[25] Colo. Rev. Stat. c. 90 § 1-2 (1953).

All marriages entered into between Negroes or mulattoes of either sex, and white persons are declared to be absolutely void. Nothing in this section shall be so construed as to prevent the people living in that portion of the state acquired from Mexico from marrying according to the customs of that country.

[26] See Appendix

are compounded of legal fiction and genetic nonsense.[27]

Conclusion

When subjected to the test of the Fourteenth Amendment, the prohibition of interracial marriage must be found unconstitutional. Not only do the anti-miscegenation statutes have no scientific basis, but their philosophy is an affront to millions of our citizens.

Repugnant as is the rationale of "social practices", at least that statement has the virtue of honesty as distinguished from the biologic absurdity of "mongrel breed" and "weak and effeminate offspring". But the right of equal protection may not be denied even though a substantial segment of the population finds it distasteful. Desegregation of the schools, housing, and public facilities, and freedom to vote are being required despite the violence of the opposition.

Classification by race based upon non-existent racial traits does not serve any valid legislative purpose but merely continues a classification of Americans as superior and inferior in contradiction to the American concept of equality.

Wherefore, for the reasons hereinabove stated and for the reasons set forth in appellants' brief, the judgment of the court below should be reversed.

Respectfully submitted,

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[27] Hager, Some Observations on the Relationship Between Genetics and Social Science, 13 *Psychiatry* 371 (1950).

APPENDIX

State Legislation Against Mixed Marriages in the United States

Prohibited Marriages [a]

State and Statutory Reference	Ethnic Groups Prohibited from Marrying Whites [b and c]	Penal Offense
Alabama Const. § 102; Code tit. 14, § 360	"negro or the descendant of any negro"	Felony (Code tit. 14, § 360)
Arkansas Stat. § 55-104	"any person who has in her or his veins any negro blood whatever"	Misdemeanor (Stat. § 55-105)
Delaware Code tit. 13, § 101	"a negro or mulatto"	Misdemeanor (Code tit. 13, § 102)
Florida Const. art. XVI, § 24; Stat. § 741.11	"a negro . . . or a person of negro descent to the fourth generation, inclusive"	Felony (Stat. § 741.12)
Georgia Code § 53-106; Chap. 53.3	"It shall be unlawful for a white person to marry anyone except a white person." "White persons are only persons of the white or Caucasian race who have no ascertainable trace of either negro, African, West Indian, Mongolian, Japanese or Chinese blood in their veins."	Felony (Code § 53-9903)
Kentucky Rev. Stat § 402.020	"a negro or mulatto"	Felony (Stat. § 402-990)
Louisiana Civ. Code art. 94	"persons of color"	Felony (Crim. Code art. 740-79)

State and Statutory Reference	Ethnic Groups Prohibited from Marrying Whites [b and c]	Penal Offense
MARYLAND Code art. 27, § 398	"a negro . . . or a person of negro descent to the third generation inclusive . . . a person of the Malay race".[b]	"A white woman who shall suffer herself to be got with child by a negro or mulatto . . . shall be sentenced to the penitentiary for not less than eighteen months nor more than five years." (Code art. 27, § 513)
MISSISSIPPI Const. art. 14, § 263; Code § 459	"a negro or mulatto or person who shall have one-eighth or more of negro blood or . . . a Mongolian or person who shall have one-eighth or more of Mongolian blood."	Felony (Code § 2339)
MISSOURI Rev. Stat. §§ 451.020 and 563.240	"negroes . . . and Mongolians." Negroes are defined as persons "having one-eighth part or more negro blood."	Felony (Rev. Stat. § 563.240)
NORTH CAROLINA Const. art. XIV, § 8; Gen. Stat. §§ 14-181 and 51-3	"a negro or Indian . . . or a person of negro or Indian descent to the third generation, inclusive".[c]	Misdemeanor, but sentence may be up to ten years. (Gen. Stat. § 14-181)
OKLAHOMA Stat. tit. 43, § 12	"any person of African descent."	Felony (Stat. tit. 43, § 13)
SOUTH CAROLINA Const. art. 3, § 34; Code § 20-7	"any mulatto, half-breed, Indian, negro or mestizo."	Misdemeanor (Code § 20-7)
TENNESSEE Const. art. II, § 14, Code § 36-402	"negroes, mulattos, or persons of mixed blood descended from a negro to the third generation, inclusive."	Felony (Code § 36-403)

State and Statutory Reference	Ethnic Groups Prohibited from Marrying Whites [b] and [c]	Penal Offense
TEXAS Rev. Civ. Stat. art. 4607	"Africans or the descendants of Africans."	Felony (Penal Code art. 492)
VIRGINIA Code § 20-54	"It shall be unlawful for any white person to marry any save a white person, or a person with no other admixture of blood than white and American Indian . . . the term 'white person' shall apply to such person who has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons."	Felony (Code § 20-59)
WEST VIRGINIA Code § 4701(I)	"a negro."	White persons may be fined not more than $100 and imprisoned for not more than one year. No penalties against Negro persons. (Code § 4697)

[a] In West Virginia, though the marriage is performed in violation of the prohibitory statute, it is valid until such time as a court declares it a nullity. In all the other states listed the marriage is void.

[b] In Maryland, a marriage between "a negro and a member of the Malay race, a person of negro descent, to the third generation, inclusive, and a member of the Malay race" is also prohibited.

[c] In North Carolina a marriage between "a Cherokee Indian of Robeson County and a negro, or between a Cherokee Indian of Robeson County and a person of negro descent to the third generation" is also prohibited.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 395

RICHARD PERRY LOVING, Et Ux.,
Appellants,

v.

VIRGINIA,
Appellee.

Appeal From the Supreme Court of Appeals of Virginia

BRIEF AND APPENDIX ON BEHALF OF APPELLEE

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IN THE

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No. 395

RICHARD PERRY LOVING, Et Ux.,

Appellants,

v.

VIRGINIA,

Appellee.

Appeal From the Supreme Court of Appeals of Virginia

BRIEF AND APPENDIX ON BEHALF OF APPELLEE

PRELIMARY STATEMENT

On January 6, 1959, appellants were convicted in the Circuit Court of Caroline County of leaving the State of Virginia and contracting a miscegenetic marriage in the District of Columbia with the intention of returning to—and actually returning and residing in—Virginia, in violation of Section 20-58 of the Virginia Code. Each appellant was sentenced to serve one year in jail; however these sentences were suspended for a period of twenty-five years upon the provision that appellants would leave Caroline County and

the State of Virginia at once and not return together or at the same time to the county or state within such period. Upon payment of costs, appellants were released from custody and further recognizance.

On November 6, 1963, appellants filed in the Circuit Court of Caroline County a motion to vacate the judgment and set aside the sentence therein contained. Thereafter, the trial court filed an opinion indicating its intention to deny the motion, and an order effectuating such opinion was entered on January 22, 1965. Appellants subsequently appealed from this order to the Supreme Court of Appeals of Virginia, and the cause was heard on the merits. On March 7, 1966, the Supreme Court of Appeals of Virginia entered its opinion and order (1) affirming the order of the trial court with respect to the validity of the challenged statute (2) reversing that portion of the order of the trial court upholding the validity of the sentence imposed upon appellants and (3) remanding the cause for further proceedings not inconsistent with the views expressed by the Court on the latter question. See, *Loving* v. *Commonwealth,* 206 Va. 924, 147 S.E. (2d) 78. The case is now before this Court upon an appeal filed by appellants on July 29, 1966, the Supreme Court of Appeals of Virginia having stayed the execution of its judgment to permit such appeal. Probable jurisdiction was noted by this Court on December 12, 1966. *Loving, et ux.* v. *Virginia,* ..... U.S. ....., 17 L.Ed. (2d) 448.

STATEMENT OF THE CASE

Richard Perry Loving, one of the appellants in this case, is a white, male citizen of the United States who was at all times relevant to this litigation a citizen and resident of the Commonwealth of Virginia. Mildred Jeter Loving,

the additional appellant in this case, is a Negro, female citizen of the United States who was at all times relevant to this litigation a citizen and resident of the Commonwealth of Virginia. Richard Perry Loving is a "white person" within the definition of the Virginia Code, and Mildred Jeter Loving is a "colored person" within the definition of the Virginia Code. (R. 9).

On or about June 2, 1958, appellants went to the District of Columbia and were there married to each other pursuant to the laws of the District of Columbia. Subsequently, they returned to their residence in Caroline County, Virginia, and at the October Term, 1958, of the Circuit Court of Caroline County, an indictment was filed charging that on the 2nd day of June, 1958, "the said Richard Perry Loving, being a white person and the said Mildred Delores Jeter being a colored person, did unlawfully and feloniously go out of the State of Virginia, for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth." (R. 6).

On January 6, 1959, appellants entered pleas of guilty to the charge specified in the indictment, whereupon the court fixed the punishment of each appellant at one year in jail. Thereafter, the court suspended such sentence for a period of twenty-five years upon the provision that both appellants leave Caroline County and the State of Virginia at once and not return together or at the same time to said county and state during the specified period. Upon payment of costs, appellants were released from custody and further recognizance. (R. 6).

THE STATUTES INVOLVED

The statutes under attack in the instant proceedings are Sections 20-58 and 20-59 of the Code of Virginia (1950), which statutes respectively prescribe:

> "§ 20-58—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."
>
> "§ 20-59.—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

QUESTION PRESENTED

Are Sections 20-58 and 20-59 of the Virginia Code violative of the Fourteenth Amendment to the Constitution of the United States?

SUMMARY OF ARGUMENT

As pointed out by the Supreme Court of Appeals of Virginia in the case at bar (206 Va. at 926, 147 S.E. (2d) at 80):

> "The sole contention of the defendants, with respect to their convictions, is that Virginia's statutes prohibiting the intermarriage of white and colored persons are violative of the Constitution of Virginia and the Constitution of the United States. Such statutes, the

defendants argue, deny them due process of law and equal protection of the law."

Counsel for appellee submit that the constitutional issue tendered by the instant appeal has been so thoroughly settled against the position of appellants, and settled by such an exhaustive array of judicial authority, as to make it necessary for this Court to rewrite or amend the Fourteenth Amendment to reverse the judgment of the Supreme Court of Appeals of Virginia.

Initially in this connection, an analysis of the legislative history of the Fourteenth Amendment conclusively establishes the clear understanding—both of the legislators who framed and adopted the Amendment and the legislatures which ratified it—that the Fourteenth Amendment had no application whatever to the anti-miscegenation statutes of the various States and did not interfere in any way with the power of the States to adopt such statutes. The precise question was specifically considered by the framers of the Amendment, and a clear intent to exclude such statutes from the scope of the Fourteenth Amendment was repeatedly made manifest.

The propriety of undertaking a study of the legislative history of the Fourteenth Amendment so that it may be read to effectuate the intent and purposes of the Framers is abundantly supported by numerous decisions of this Court. See, *Bell* v. *Maryland,* 378 U.S. 226, 288-289; *Ullman* v. *United States,* 350 U. S. 422, 428; *Adamson* v. *California,* 332 U. S. 46, 72. As this Court has frequently pointed out, the Fourteenth Amendment had its origins in the Civil Rights Act of 1866 and a companion measure, the Freedman's Bureau Bill, and was adopted to provide a firm constitutional basis for the Civil Rights Act of 1866. *Bell* v. *Maryland, supra,* at 292-293, *Adamson* v. *California,*

supra, at 68, 107-108. A review of the debates on the bill which ultimately became the Civil Rights Act of 1866, discloses beyond cavil the intention of the Framers to exclude State anti-miscegenation laws from the terms of that enactment.

Moreover, the intention of the legislatures of the various States which ratified the Fourteenth Amendment was entirely consistent with that of the Framers, as indisputably evidenced by the fact that a majority of the States which ratified the Fourteenth Amendment still maintained and enforced their anti-miscegenation laws as late as 1950. In addition, the decisions of both State and Federal courts contemporaneous with the passage of the Fourteenth Amendment—decisions authored by jurists familiar with the process by which that Amendment became part of the Constitution—clearly indicated that anti-miscegenation laws of the various States are not violative of the Fourteenth Amendment. Since the constitutional duty of this Court is "to construe, not to rewrite or amend" the Constitution—a duty which requires this Court to read the Fourteenth Amendment "to effectuate the intent and purposes of the Framers"—counsel for appellee assert that, *as a matter of law,* the Fourteenth Amendment has no applicability to the anti-miscegenation statutes of the various States and does not circumscribe to any degree the power of the States to prevent interracial marriages. See, *Bell* v. *Maryland, supra,* at 288-289.

Secondly, counsel for appellee submit that to give effect to the legislative history of the Fourteenth Amendment is to obviate inappropriate judicial inquiry into the wisdom or desirability of a State policy preventing interracial alliances. Under well settled constitutional doctrine, such an inquiry into evidence of a scientific nature tending to sup-

port or undermine a legislative determination of the wisdom or desirability of such a policy is clearly impermissible. In this connection, the Supreme Court of Appeals of Virginia correctly pointed out (206 Va. at 929, 147 S.E. (2d) at 82):

> "The defendants also refer us to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the *Naim* decision is erroneous and that such marriages should not be forbidden by law.
>
> "A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term. Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this Court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate."

If this Court (erroneously, we contend) should undertake such an inquiry, it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view. The available scientific materials are sufficient to support the validity of the challenged Virginia statutes whether the constitutional standard be deemed to require appellants to demonstrate that those statutes are arbitrary, capricious and unreasonable or to require the State to show a compelling interest in the continuation of its policy prohibiting interracial marriages. In such a situation it is the exclusive province of the Legislature of each State to make the determination for its citizens as to the

desirability of a policy of permitting or preventing such alliances—a province which the judiciary may not constitutionally invade.

ARGUMENT

Sections 20-58 and 20-59 Of The Virginia Code Are Not Violative Of The Fourteenth Amendment To The Constitution Of The United States.

A.

The Precise Statutes Under Attack In This Case

The record discloses that the indictment under which appellants were convicted in the Circuit Court of Caroline County charged that, on June 2, 1958, "Richard Perry Loving being a White person and the said Mildred Dolores Jeter being a Colored person, did unlawfully and feloniously go out of the State of Virginia for the purpose of being married, and with the intention of returning to the State of Virginia and were married out of the State of Virginia, to-wit, in the District of Columbia on June 2, 1958, and afterwards returned to and resided in the County of Caroline, State of Virginia, cohabiting as man and wife against the peace and dignity of the Commonwealth."

The substantial identity between the language of the indictment quoted above and that contained in Section 20-58 of the Virginia Code (*ante*, p. 4) establishes that appellants were indicted for violation of Section 20-58 of the Virginia Code and that sentence was imposed in accordance with the provisions of Section 20-59 of the Virginia Code as specified in the statute under which the indictment was laid. In this connection, the Supreme Court of Appeals of Virginia pointed out (206 Va. at 925, 147 S.E. (2d) at 79):

> "There is no dispute that Richard Perry Loving is a white person and that Mildred Jeter Loving is a

> colored person within the meaning of Code, § 20-58. Nor is there any dispute that the actions of the defendants, as set forth in the indictment, violated the provisions of Code, § 20-58."

In light of these circumstances, it is manifest that the instant appellants possess the requisite standing to challenge only the provisions of Sections 20-58 and 20-59 of the Virginia Code and that the Supreme Court of Appeals of Virginia passed upon the validity of these statutes only. So far as the instant litigation is concerned, no official of the Commonwealth of Virginia has undertaken to apply or impose any provision of the remaining statutes comprising Chapter 4 of Title 20 of the Virginia Code to the present appellants. Specifically in this connection, no attempt has been made to bring the marital status of the appellants within the ambit of Section 20-54 of the Virginia Code or its collateral statutes (Sections 20-50, 20-51, 20-52, 20-53 and 20-55) which comprise Chapter 371 of the Acts of Assembly (1924) entitled "An Act to preserve racial integrity." See Appendix A, *post*.

B.

History of the Fourteenth Amendment

As a prologue to this portion of our brief, counsel for appellee—at the risk of rehearsing the obvious—wish to set forth certain fundamental canons of constitutional construction which are universally regarded as "first principles" and nowhere questioned. The language in which these rules are couched is that appearing in well known legal compendiums, and the statements in question have been grouped—for the purpose of demonstrating the undeviating uniformity of authoritative expression—into two categories

designated by counsel as *Necessity of Ascertaining and Effectuating Intent of Framers and People* and *Necessity of Uniformity of Construction.*

Necessity of Ascertaining and Effectuating Intent of Framers and People

"The prime effort of fundamental purpose, in construing a constitutional provision, is to ascertain and give effect to the intent of the framers and of the people who adopted it. The court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption, and proper regard should be given to the evils, if any, sought to be prevented or remedied. Effect should be given to the purpose indicated by a fair interpretation of the language used, and that construction which effectuates, rather than that which destroys a plain intent or purpose of a constitutional provision, is not only favored but will be adopted." (16 C.J.S. 72, Constitutional Law: Sec. 16)

* * *

"The fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and of the people adopting it.* * *

"It has been very appropriately stated that the polestar in the construction of Constitutions is the intention of the makers and adopters.

"Whereever the purpose of the framers of a Constitution is clearly expressed, it will be followed by the courts. Even where terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption, because in construing a constitutional provision, its general scope and object should be considered.

"It is settled by very high authority that in placing a construction on a Constitution or any clause or part thereof, a court should look to the history of the times and examine the state of things existing when the Constitution was framed and adopted, in order to ascertain the prior law, the mischief, and the remedy. A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws with reference to them. Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption, the general spirit of the times, and the prevailing sentiments among the people. * * *

"Construction based on custom, usage, or the conclusions of the courts must be properly subordinated to the time factor of the creation of the Constitution itself, and later usages cannot override a patent intention expressed at an earlier date. Thus, neither statutes enacted nor judicial opinions rendered since the adoption of a Constitution can impute a different meaning to it than that obviously intended at the time the Constitution was adopted." (11 Am. Jur. 674, Constitutional Law: Secs. 61, 63)

Necessity of Uniformity of Construction

"A cardinal rule in dealing with Constitutions is that they should receive a consistent and uniform interpretation, so that they shall not be taken to mean one thing at one time and another thing at another time, even though the circumstances may have so changed as to make a different rule seem desirable. . . . Furthermore, Constitutions do not change with the varying tides of public opinion and desire: The will of the people therein recorded is the same inflexible law until changes by their own deliberative action, and therefore the courts should never allow a change in public sentiment to influence them in giving a construction to a written Constitution not warranted by

the intention of its founders." (11 Am. Jur. 659, Constitutional Law: Sec. 50)

* * *

"In view of the rule, . . . that the meaning of a constitution is fixed when it is adopted, the construction given it must be uniform, so that the operation of the instrument will be inflexible, operating at all times alike, and in the same manner with respect to the same subjects; and this is true even though the circumstances may have so changed as to make a different rule seem desirable, since the will of the people as expressed in the organic law is subject to change only in the manner prescribed by them." (16 C.J.S. 117, Constitutional Law: Sec. 37)

* * *

"A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. . . . There is nothing primitive about a state constitution. It is based upon the preexisting laws, rights, habits and modes of thought of the people who ordained it, and the fundamental theory of sovereignty and of government which has been developed under the common law, and it must be construed in the light of this fact.

"However, it is a well settled rule, that the meaning of the constitution is fixed, when it is adopted; and it is not different at any subsequent time, when a court has occasion to pass upon it." (4 M. J. 97, Constitutional Law: Sec. 7, 10)

Of course, no particularized citation of decisional authority supportive of these principles is required. Every thought enunciated in the foregoing quotations has been approved and applied by this Court on numerous occasions, and a host of prior decisions could be marshaled to establish, not only the authoritative character of these rules, but the indispensability of their full recognition to the proper

resolution of constitutional questions. Indeed, support for most of these principles is readily available in the decisions of this Court in *Adamson* v. *California,* 332 U.S. 46, 91 L. Ed. 1903; *Ullman* v. *United States,* 350 U.S. 422, 100 L. Ed. 511; and *Bell* v. *Maryland,* 378 U.S. 226, 12 L. Ed. (2d) 822. In his dissenting opinion in the former case, Mr. Justice Black pointed out that (332 U.S. at 72, 91 L. Ed. at 1919):

> "In construing other constitutional provisions, this Court has almost uniformly followed the precept ... Ex parte Bain, 121 US 1, 12, 30 L ed 849, 853, 7 S Ct 781, that 'It is never to be forgotten that in the construction of the language of the Constitution ... as indeed in all other instances where construction becomes necessary, *we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.*' See also *Everson* v. *Board of Education,* 330 US 1, 8, 28, 33, ante, 711, 719, 729, 732, 67 S Ct 504, 168 ALR 1392; *Thornhill* v. *Alabama,* 310 US 88, 95, 102, 84 L ed 1093; 1098, 1102, 60 S Ct 736; *Knowlton* v. *Moore,* 178 US 41, 89, 106, 44 L ed 969, 988, 995, 20 S Ct 747; *Reynolds* v. *United States,* 98 US 145, 162, 25 L ed 244, 249; *Barron* v. *Baltimore, supra* (7 Pet (US) at 250, 251, 8 L ed 675); *Cohens* v. *Virginia,* 6 Wheat (US) 264, 416-420, 5 L ed 257, 294, 295." (Italics supplied.)

Moreover, in the *Ullmann* case, Mr. Justice Frankfurter —speaking for the Court—declared (350 U.S. at 428, 100 L. Ed. at 519):

> *"Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process."* (Italics supplied.)

Finally, in the recent case of *Bell* v. *Maryland, supra,* Mr. Justice Goldberg approached the consideration of an analogous situation with the following admonition (378 U.S. at 288-289, 12 L. Ed. (2d) at 834):

> "Of course, our constitutional duty is 'to construe, not to rewrite or amend, the Constitution.' Post, at 865 (dissenting opinion of Mr. Justice Black). Our sworn duty to construe the Constitution *requires,* however, that we read it *to effectuate the intent and purposes of the Framers.* We must, therefore, consider the history and circumstances indicating what the Civil War Amendments were in fact designed to achieve." (Italics supplied.)

The Fourteenth Amendment grew out of the Civil Rights Act of 1866 and its forerunner, the Freedmen's Bureau Bill. It therefore becomes necessary that the debates in the 1st Session of the 39th Congress (1865-1866) be researched in order to determine the meaning of the pertinent language of the Fourteenth Amendment as understood by its authors and its proponents.

The first material occurrence was the introduction of the supplemental Freedmen's Bureau Bill.[1] This bill was the first reconstruction proposal and was a forerunner of the Fourteenth Amendment. It was introduced as a supplement to the original Freedmen's Bureau Bill enacted in March, 1865. The original protected only those Negroes who had been freed in territory under federal control. The supplemental bill, as reported by the Judiciary Committee of the Senate, contained a number of sections, the first six of which authorized the division of the seceding states into districts, the appointment of commissioners, the reservation

[1] S. 60, 39th Congress, 1st Session (1866).

of land, and the awarding of such lands to loyal refugees and freedmen.

The seventh section contained language which, by way of the Civil Rights Act, subsequently became a part of the Fourteenth Amendment. It provided, in part, that if, because of any state or local law, custom or prejudice:[2]

> "... any of the civil rights of immunities belonging to white persons, including the right to make and enforce contracts ... and to have full and equal benefit of all laws and proceedings for the security of person and estate, are refused or denied to negroes ... on account of race ... it shall be the duty of the President of the United States, through the Commissioner, to extend military protection ... over all cases affecting such persons so discriminated against."

Section 8 made it a misdemeanor for any person to subject any other person on account of color:[3]

> "... to the deprivation of any civil right secured to white persons, or to any different punishment. ..."

Senator Thomas A. Hendricks of Indiana, an opponent of the Bill, expressed the fear in the Senate debates that the "civil rights or immunities" clause in the seventh section would nullify many salutary laws of Indiana, including an Indiana constitutional provision which provided that no Negro man should be allowed to intermarry with a white woman. He then said:[4]

> "Marriage is a civil contract, and to marry according to one's choice is a civil right. Suppose a State shall

[2] Senate Document, 39th Cong., 1st Session, Ex Doc. No. 24, p. 9.
[3] Id. at 10.
[4] Cong. Globe, 39th Cong., 1st Sess. 318 (January 19, 1866).

> deny the right of amalgamation, the right of a negro man to intermarry with a white woman, then that negro may be taken under the military protection of the Government; and what does that mean? . . . Does it mean that this military power shall enforce his civil right, without respect to the prohibition of the local law? In other words, if the law of Indiana, as it does, prohibits under heavy penalty the marriage of a negro with a white woman, may it be said a civil right is denied him which is enjoyed by all white men, to marry according to their choice; and if it is denied, the military protection of the colored gentlemen is assumed, and what is the result of it all? I suppose they are then to be married in the camp of the protecting officer without regard to the State laws. . . .

Senator Lyman Trumbull of Illinois, who had introduced the Bill and was its manager, made it clear that there was no intention to nullify the anti-miscegenation statutes or constitutional requirements of the various states or to restrict such future legislation as to miscegenation. On that point he said:[5]

> ". . . But, says the Senator from Indiana, we have laws in Indiana prohibiting black people from marrying whites, and you are going to disregard these laws? Are our laws enacted for the purpose of preventing amalgamation to be disregarded, and is a man to be punished because he undertakes to enforce them? I beg the Senator from Indiana to read the bill. One of its objects is to secure the same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law

[5] Cong. Globe, 39th Cong., 1st Sess. 322 (January 19, 1866).

> of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vice versa?* I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races. *This bill does not interfere with it.* If the negro is denied the right to marry a white person, the white person is equally denied the right to marry the negro. I see no discrimination against either in this respect that does not apply to both. Make the penalty the same on all classes of people for the same offense, and then no one can complain." (Italics supplied.)

A week later Senator Garrett Davis from Kentucky likewise expressed the fear tha the language of Section 7 was broad enough to strike down the anti-miscegenation laws of the State of Kentucky.[6]

Senator Trumbull replied:[7]

> "... The Senator says the laws of Kentucky forbid a white man or woman marrying a negro, and that these laws of Kentucky are to exist forever; that severe penalties are imposed in the State of Kentucky against amalgamation between the white and black races.... *"But, sir, it is a misrepresentation of this bill to say that it interferes with those laws.* I answered that argument the other day when it was presented by the Senator from Indiana. The bill provides for dealing out the same punishment to people of every color and every race; and if the law of Kentucky forbids the white man to marry the black woman I presume it equally forbids the black woman to marry the white man, and the punishment is alike upon each. All this bill provides for is that there shall be no discriminations in punishments on account of color; and

[6] Cong. Globe, 39th Cong., 1st Sess., 418.

[7] Cong. Globe, 39th Cong., 1st Sess., 420.

> unless the Senator from Kentucky wants to punish the negro more severely for marrying a white person than a white for marrying a negro, the bill will not interfere with his law." (Italics supplied.)

The supplemental bill passed the Senate on January 25, 1866, by a vote of 37 to 10, three absent.

On the same day the Bill was sent to the House of Representatives, but on the following day Senator Johnson from Maryland made motion to reconsider requesting that the Secretary of the Senate ask for the return of the Bill from the House of Representatives. Senator Johnson's motion was defeated 22 to 18.

While the Bill was under consideration in the House of Representatives, on February 3, 1866, Representative Samuel W. Moulton from Illinois demonstrated the inapplicability of the language of the bill to state laws forbidding miscegenation or interracial marriages. In part he said:[8]

> "My colleague says that . . . it is a civil right for a black man to marry a white woman. . . . I deny that it is a civil right for a white man to marry a black woman or for a black man to marry a white woman. . . . It is a matter of mutual taste, contract, and understanding between the parties. . . . The law, as I understand it, in all the States, applies equally to the white man and the black man, and there being no distinction, it will not operate injuriously against either the white or the black. . . .
>
> "I understand that the civil rights referred to in the bill are not of the fanciful character referred to by the gentleman, but the great fundamental rights that are secured by the Constitution of the United States, and that are defined in the Declaration of

[8] Id. at 632 (Feb. 3, 1866).

Independence, the right to personal liberty, the right to hold and enjoy property, to transmit property, and to make contracts. These are the great civil rights that belong to us all, and are sought to be protected by this bill."

Thereupon, the following colloquy occurred:[9]

"MR. THORNTON. On the point upon which my colleague is now speaking, civil rights, I would ask him if a marriage between a white man and a white woman is a civil right?

"MR. MOULTON. It is not a civil right.

"MR. THORNTON. It is not?

"MR. MOULTON. No, sir, not in my opinion.

"MR. THORNTON. Then what sort of a right is it?

"MR. MOULTON. Marriage is a contract between individuals competent to contract it.

"MR. THORNTON. Is it a political or civil right?

"MR. MOULTON. It is a social right. I understand that a civil right is a right that a party is entitled to and that he can enforce by operation of law.

"MR. THORNTON. I would ask my colleague if marriages are not contracted in all the States of this Union by virtue of provisions of law?

"MR. MOULTON. I think, perhaps, they are to a greater or less extent.

"MR. THORNTON. It is not especially provided for by the law regulating it. The right to marry is a right which cannot be enforced.

"There are a great many things a man can do that are imperfect obligations which cannot be enforced"

[9] Id. at 632, 633 (Feb. 3, 1866).

> by law, and hence are not civil rights contemplated by this bill.... The remarks that I made in connection with this matter were made for this purpose: I say that the right to marry is not strictly a right at all, because it rests in contract alone between individuals, and no other person has a right to contract it. It is not a right in any legal or technical sense at all. No one man has any right to marry any woman he pleases. If there was a law making that a civil right, then it might be termed a civil right in the sense in which it is used here. But there being no law in any state to that effect, I insist that marriage is not a civil right, as contemplated by the provisions of this bill...."

On the same day, Hon. L. H. Rousseau of Kentucky, expressed the fear that under the proposal a minister might be arrested for refusing to solemnize marriages between whites and negroes.[10]

He was answered on the same day by Hon. C. E. Phelps of Maryland, even though he himself opposed the bill as written and desired amendments:[11]

> "—Efforts have been made, and very ingeniously, by gentlemen opposed to the bill,—by arguing from the language used in the seventh and eighth sections an inference of a design *to control state laws in respect to the marriage relation. Such a construction is not warranted by the terms employed.*—" (Italics supplied.)

After final passage, the Freedmen's Bureau Bill was vetoed on February 19th, 1866.[12] The veto was sustained February 20, 1866.

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[10] Appendix to the Congressional Globe, 39th Cong., 1st Sess. (p. 69).

[11] Id. at p. 75.

[12] Cong. Globe, 39th Cong., 1st Sess., p. 915.

In a slightly modified form, the Bill was later re-enacted over the veto of the President.[13]

The Senate then proceeded to consider the proposed Civil Rights Act which was under the same management. The first section contained the following language:[14]

> "The inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

It also provided that:[15]

> "—there shall be no discrimination in civil rights or immunities among the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery."

Again Senator Johnson expressed his misgivings about the possible effect of this act on the miscegenation statutes of the States. Among other things he said:[16]

> "There is not a State in which these Negroes are to be found where slavery existed until recently, and I am not sure that there is not the same legislation

[13] 14 Statutes 173 (1866).

[14] Id. at 504.

[15] Id. at 505.

[16] Id. at p. 505.

in some of the States where slavery has long since been abolished, which does not make it criminal for a black man to marry a white woman, or for a white man to marry a black woman; and they do it not for the purpose of denying any right to the black man or to the white man, but for the purpose of preserving the harmony and peace of society. The demonstrations going on now in your free States show that a relation of that description cannot be entered into without producing some disorder. Do you not repeal all that legislation by this bill? I do not know that you intend to repeal it; but it is not clear that all such legislation will be repealed, and that consequently there may be a contract of marriage entered into as between persons of these different races, a white man with a black woman or a black man with a white woman?—"

Thereupon, Senator William Pitt Fessenden, of Maine, asked:[17]

"Where is the discrimination against color in the law to which the Senator refers?"

The following colloquy then took place.[18]

"MR. JOHNSON. There is none, that is what I say; that is the very thing I am finding fault with.

"MR. TRUMBULL. This bill would not repeal the law to which the Senator refers, if there is no discrimination made by it.

"MR. JOHNSON. Would it not? We shall see directly. Standing upon this section, it would be admitted that the black man has the same right to enter into a contract of marriage with a white woman as a white man has, that is clear, because marriage is a contract. I was speaking of this without a reference to any State legislation.

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[17] Id. at 505, 506.

[18] Id. at 505, 506.

"MR. FESSENDEN. He has the same right to make a contract of marriage with a white woman that a white man has with a black woman."

The Civil Rights Act of 1866 passed the Senate on February 2nd by a vote of 33 to 12.[19] On March 13th with a few minor changes, it passed the House of Representatives by a vote of 111 to 38.[20] The House amendments were adopted in the Senate without debate.[21]

The Act was vetoed by President Johnson on March 27, 1866.[22] The veto was overriden in the Senate, 33 to 15, on April 6, 1866[23] and was overriden in the House 122 to 41 on April 9, 1866.[24]

So far as research discloses, all of the proponents of the supplemental Freedmen's Bureau Bill and the Civil Rights Act of 1866 were of one accord in insisting that there was nothing in those acts that could possibly be construed as nullifying the anti-miscegenation laws of the various states.

The supplemental Freedmen's Bureau Bill and the Civil Rights Act were taken up, debated and passed before the resolution proposing the Fourteenth Amendment came before the Congress for debate, but all had the same management and were a part of the same package. The proposal to amend the Constitution preceded the passage of the Bill and the Act, but the debates on the proposed amendment came after consideration of the two.

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[19] Id. at 606, 607.
[20] Id. at 1367.
[21] Id. at 1413-16.
[22] Id. at 1679.
[23] Id. at 1809.
[24] Id. at 1861.

When the 39th Congress convened in December 1865, Thaddeus Stevens, a Pennsylvania representative, proposed the creation of a joint committee on reconstruction consisting of six senators and nine representatives.[25] This proposal was adopted and the committee of fifteen prepared the resolution that was finally proposed as the Fourteenth Amendment. The debates on the supplemental Freedmen's Bureau Bill and the Civil Rights Act therefore serve to refine and define the language that later went into the Fourteenth Amendment. As is well known, the purpose of the Fourteenth Amendment was to confer power upon the Congress to enact such laws as were embodied in the Bill and the Act. For example, on May 8, 1866, Thaddeus Stevens said that Section 1 of the proposed amendment and its other provisions:[26]

> "—all are asserted, in some form or other, in our Declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all.—Some answer, 'Your civil rights bill secures the same things.' That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed—"

[25] Id. at 6.

[26] Cong. Globe, 39th Cong., 1st Sess., p. 2459.

Representative Thaddeus Stevens thus contended that the purpose of the first section of the amendment was to write the Civil Rights Act into the Constitution without in any wise adding to the rights protected by the Act.

Representative William E. Finck of Ohio then stated that if the first section of the proposed amendment was necessary, the Civil Rights Act was unconstitutional.[27] His colleague from Ohio, Representative James A. Garfield, disagreed, saying that the purpose of the first section of the Amendment was to prevent the repeal of the Civil Rights Act saying:[28]

> "The civil rights bill is now a part of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power. It is precisely for the reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it and no cloud can obscure it. For this reason, and not because I believe the civil rights bill unconstitutional, I am glad to see that first section here."

Representative M. Russell Thayer of Pennsylvania agreed with Mr. Garfield, saying:[29]

> "As I understand it, it is but incorporating in the Constitution of the United States the principle of the civil rights bill which has lately become a law, and that, not as the gentleman from Ohio (Mr. Finck) suggested, because in the estimation of this House

[27] Cong. Globe, 1st Sess., p. 2460-1.

[28] Id. at 2462.

[29] Id. at 2465.

> that law cannot be sustained as constitutional, but in order, as was justly said by the gentleman from Ohio who last addressed the House, (Mr. Garfield), that that provision so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States."

Representative Henry J. Raymond of New York, Publisher of the *New York Times,* had been opposed to the Civil Rights Act because of its doubtful constitutionality. As to the proposed constitutional amendment, he said:[30]

> "And now, although that bill became a law and is now upon our statute-book, it is again proposed so to amend the Constitution as to confer upon Congress the power to pass it."

The foregoing illustrates the view of the framers of the Fourteenth Amendment in the House that the purpose of the first section of the Amendment was to place the provisions of the Civil Rights Act of 1866 beyond the reach of legislative repeal. That is the verdict of history, based on the facts material to the issue.[31]

This verdict was recently re-enunciated by Mr. Justice Goldberg in the *Bell* case, *supra,* in the following language (378 U.S. at 292-293, 12 L. Ed. (2d) at 836):

> "The Fourteenth Amendment was in part designed to provide a firm constitutional basis for the Civil

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[30] Id. at 2502.

[31] Ten Brock, *The Anti-Slavery Origins of the Fourteenth Amendment,* 183 (1951); Flack, *The Adoption of the Fourteenth Amendment,* p. 81, 212 (1909).

Rights Act of 1866, 14 Stat. 27, and to place that legislation beyond the power of congressional repeal. The origins of subsequently proposed amendments and legislation lay in the 1866 bill and in a companion measure, the Freedman's Bureau Bill.[8]

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[8] As Mr. Justice Black pointed out in the Appendix to his dissent in Adamson v. California, 332 US 46, 68, 107-108, 91 L ed 1903, 1917, 1938, 67 S Ct 1672, 171 ALR 1223:

"Both proponents and opponents of § 1 of the [Fourteenth] Amendment spoke of its relation to the Civil Rights Bill which had been previously passed over the President's veto. Some considered that the amendment settled any doubts there might be as to the constitutionality of the Civil Rights Bill. Cong. Globe, [39th Cong., 1st Sess.] 2511, 2896. Others maintained that the Civil Rights Bill would be unconstitutional unless and until the amendment was adopted. Cong. Globe, 2461, 2502, 2506, 2513, 2961. Some thought that amendment was nothing but the Civil Rights [Bill] 'in another shape.' Cong. Globe, 2459, 2462, 2465, 2467, 2498, 2502."

Clearly, both friends and foes of the Fourteenth Amendment, who spoke on the subject, were of the opinion that the purpose of the Amendment was to validate the provisions of the Civil Rights Act and place them beyond the power of the judiciary to nullify or Congress to repeal. Equally manifest is the opinion of those who spoke on behalf of the Civil Rights Act that it had no application to marriage contracts or anti-miscegenation statutes. If "we are to place ourselves as nearly as possible in the condition of the men who framed" the Fourteenth Amendment (*Adamson* v. *California, supra*), we must recognize that nothing in the Fourteenth Amendment, so interpreted, authorizes federal interference with the anti-miscegenation laws of the various States. If "[n]othing new can be put into the Constitution except through the amendatory process" (*Ullman* v. *United States, supra*), the present attack on the Virginia statutes under consideration must fail.

If the intent of the State Legislatures which ratified the Fourteenth Amendment is deemed controlling, then surely the question of whether or not the Fourteenth Amendment forbids enactment of anti-miscegenation statutes by the States must be decided contrary to the contention of appellants, for those States which ratified the Fourteenth Amendment clearly signified their intent by continuation of their anti-miscegenation laws contemporaneously with the ratification of the Fourteenth Amendment. In this connection, a comparison of the States which retained their anti-miscegenation laws as late as 1951 with the list of States which ratified the Fourteenth Amendment reveals that a majority of such States maintained their anti-miscegenation laws in force after ratification of the Fourteenth Amendment. See Murray: States' Laws On Race And Color (1951); U.S.C.A. Const. Amend. XIV. Pertinent in this regard is the observation of Mr. Justice Frankfurter in *Adamson* v. *California, supra,* at 64, 91 L. Ed. at 1915, with respect to an analogous situation involving interpretation of the Fourteenth Amendment:

> "Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It would hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system."

In *In re Hobbs* 1 Woods 537 (5 Cir., 1871) a Federal court considering a petition for writ of habeas corpus submitted by one arrested for violation of a State anti-miscegenation law held that the Fourteenth Amendment did not invalidate the provisions of the statute in question.

Moreover, in *Ex parte Kinney,* 3 Hughes 9 (4 Cir., 1879), a Federal court, construing Virginia's anti-miscegenation statute, held that such statute was not violative of the Fourteenth Amendment.

In addition, as will be pointed out later in this brief, numerous decisions of the highest judicial tribunals of various States have sustained anti-miscegenation statutes against attack under the Fourteenth Amendment. Of such decisions, those contemporaneous with the passage of the Fourteenth Amendment are *Scott* v. *Georgia,* 39 Ga. 323 (1869) and *State* v. *Gibson,* 36 Indiana 389 (1871).[32]

In light of the foregoing, it is clear that—contemporaneously with the adoption of the Fourteenth Amendment —the Congress of the United States, the legislatures of various States ratifying the Fourteenth Amendment, Federal courts and State courts clearly indicated that anti-miscegenation statutes of the various States are not violative of the Fourteenth Amendment.

The precise question of the intent and purposes of those who framed, adopted and ratified the Fourteenth Amendment so far as that Amendment was deemed to affect, or not to affect, State anti-miscegenation laws has been the subject of two comprehensive treatises. The analysis set out in the immediately preceding pages of this portion of our brief was subsequently embodied in an exhaustive article by R. Carter Pittman entitled *"The Fourteenth Amend-*

[32] Counsel for Appellee in the case at bar are indebted to R. Carter Pittman, Esq., Dalton, Georgia; Charles J. Block, Esq., Macon, Georgia, James W. Kynes, Attorney General of Florida, and James J. Mahorner, Assistant Attorney General of Florida, for use of their studies from which a large portion of this section of the instant brief has been extracted. In many instances paragraphs of this section of the brief have been transposed, almost verbatim, from the brief filed on behalf of the State of Florida in the recent case of *McLaughlin* v. *Florida,* 379 U.S. 184, decided December 7, 1964.

ment: Its Intended Effect On Anti-miscegenation Laws" published in *The North Carolina Law Review*, Volume 43, No. 1, December, 1964. An equally elaborate study of the same question—containing an analysis of the relevant materials from the anti-slavery debates of 1864 to the debates on the Civil Rights Act of 1875—will be found in an article by Dr. Alfred Avins entitled "*Anti-miscegenation Laws And The Fourteenth Amendment: The Original Intent*," *Virginia Law Review*, Volume 52, No. 7, November, 1966. In the latter treatise the author asserts (Virginia Law Review, *supra*, at 1266):

> "Some, of course, have argued that the fourteenth amendment is drafted in language so general as to confer on the Supreme Court *carte blanche* to shape it into a tool for the accomplishment of what it conceives to be desirable social ends. But when the amendment is read in light of the prevailing law and conditions of the time, its language is in fact reasonably precise; *at least we can say with safety that it has no reference to anti-miscegenation laws.* Present day attacks on these laws involve no new constitutional principle, *and it cannot be said that they involve any questions to which the framers did not in fact address themselves in 1866.*" (Italics supplied).

Counsel for appellee submit that but two courses are available to this Court with respect to the legislative history of the Fourteenth Amendment in the present context—that history may either be (1) ignored or (2) given effect. It is manifest from their brief that counsel for appellants urge adoption of the former alternative, for they make no attempt whatever to establish by independent analysis on behalf of their position that the Fourteenth Amendment *was* intended by the Framers to abolish or infringe the power of the various States to enact anti-miscegenation

statutes. No single instance is cited in which any proponent of the Fourteenth Amendment even suggested that the amendment or its contemporary legislation would have any effect at all upon State anti-miscegenation laws. By contrast, as we have shown, the inviolability of such State enactments under the Civil Rights Act of 1866 and the Fourteenth Amendment was repeatedly proclaimed by the Framers and demonstrably understood by a majority of the State legislatures which ratified the Fourteenth Amendment.

In light of the many assertions by this Court that constitutional provisions must be read to effectuate the intent and purposes of the Framers and that consideration must be given to the circumstances indicating what the Fourteenth Amendment was in fact designed to achieve, counsel for appellee contend that the only course properly open to this Court is that which gives effect to the legislative history of the Fourteenth Amendment. We submit that invalidation of the statutes challenged in the case at bar necessarily entails this Court's ignoring "all the history of the Fourteenth Amendment and the course of judicial decisions which together plainly show that the Equal Protection Clause was not intended to touch state" anti-miscegenation statutes. See, *Carrington* v. *Rash,* 380 U.S. 89, 97 (dissenting opinion). And in this connection we further echo the observation of Mr. Justice Harlan in his dissenting opinion in the *Carrington* case, *supra,* at 97:

> "If that history does not prove what [we] think it does, we are at least entitled to be told why."

C.

Judicial Decisions

Thoroughly consistent with the foregoing analysis of the historical background of the Fourteenth Amendment is the

virtually uninterrupted line of judicial decisions, both Federal and State, in which the constitutional validity of State anti-miscegenation statutes has been sustained against assault under the Fourteenth Amendment. So far as the case at bar is concerned, the very statute currently under attack has been held not violative of the Fourteenth Amendment by a Federal Court of the Fourth Circuit. *Ex parte Kinney,* 3 Hughes 9, 14 Fed. Cases 607. In that case, the United States Circuit Court (now District Court) for the Eastern District of Virginia denied a writ of habeas corpus sought by a Virginia citizen who had been convicted for violation of what is now Section 20-58 of the Virginia Code. The writ was requested upon the ground, *inter alia,* that the challenged enactment violated the Fourteenth Amendment. Rejecting this contention, the Court declared (14 Fed. Cases at 606, 607, 608):

> "Congress has made no law relating to marriage. It has not, simply because it has no constitutional power to make laws affecting the domestic relations and regulating the social intercourse of the citizens of a state. *If it were to make such a law for the states, that law would be unconstitutional, and the federal courts would not hesitate to declare it so.*
>
> * * *
>
> "It was competent for the state of Virginia, *so far as there is anything in the constitution and laws of the United States to prevent,* to enact the law just quoted under which the petitioner was convicted. . . .
>
> * * *
>
> "On the whole, I am of the opinion that the law of Virginia, under which this petitioner is detained in prison by the state, *does not violate the constitution or any law of the United States. . . .*" (Italics supplied.)

The most recent decision of a Federal Court on the question of the constitutionality of anti-miscegenation statutes appears to be *Stevens* v. *United States,* 10 Cir., 146 F. (2d) 120. In that case, the Court of Appeals for the Tenth Circuit stated (146 F. (2d) at 123):

> "Section 12, supra, making unlawful marriages between persons of African descent and persons of other races or descents is challenged on the ground that it violates the Fourteenth Amendment. Marriage is a consentient covenant. It is a contract in the sense that it is entered into by agreement of the parties. But it is more than a civil contract between them, subject to their will and pleasure in respect of effects continuance, or dissolution. *It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state.* A state has power to prescribe by law the age at which persons may enter into marriage, the procedure essential to constitute a valid marriage, the duties and obligations which it creates, and its effects upon the property rights of both parties. *Maynard* v. *Hill,* 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654. *And within the range of permissible adoption of policies deemed to be promotive of the welfare of society as well as the individual members thereof, a state is empowered to forbid marriages between persons of African descent and persons of other races or descents. Such a statute does not contravene the Fourteenth Amendment.*" (Italics supplied.)

To the same effect are the decisions in a host of cases arising in various jurisdictions, both State and Federal, in which the constitutional validity of State anti-miscegenation statutes has receved judicial approbation. See, *Jack-*

son v. *State,* 37 Ala. App. 519, 72 So. (2d) 114, 260 Ala. 698, 72 So. (2d) 116, *cert. den.* 348 U.S. 888, 99 L. Ed. 698; *Rogers* v. *State,* 37 Ala. App. 638, 73 So. (2d) 389; *State* v. *Pass,* 59 Ariz. 16, 121 P. (2d) 882 (1942); *Dodson* v. *State,* 61 Ark. 57, 31 S.W. 977 (1895); *State* v. *Gibson,* 36 Ind. 389 (1871); *Scott* v. *Georgia,* 39 Ga. 321 (1869); *State* v. *Kennedy,* 76 N.C. 251 (1869); *State* v. *Jackson,* 80 Mo. 175 (1883); *In Re Paquet's Estate,* 101 Ore. 393; 200 P. 911 (1921); *Lonas* v. *State,* 3 Heisell (50 Tenn.) 287 (1871); *Frasher* v. *State,* 3 Tex. App. 263 (1877); *Re Shun T. Takahashi's Estate,* 113 Mont. 490, 129 P. (2d) 217 (1942); *In re Hobbs,* 1 Woods 537, 12 Fed. Cases 262 (5th Cir. 1871); *Ex Parte Francois,* 3 Woods 367, 9 Fed. Cases 699 (5th Cir. 1879).

The most recent decisions of State courts upon the question here under consideration are *State* v. *Brown,* 236 La. 562, 108 So. (2d) 233; *Naim* v. *Naim,* 197 Va. 80, 87 S. E. (2d) 749; *remanded* 350 U. S. 891, *aff'd.* 197 Va. 734, 90 S. E. (2d) 849, *app. dism.* 350 U. S. 985; and *Jackson* v. *State,* 37 Ala. App. 519, 72 So. (2d) 114, 260 Ala. 698, 72 So. (2d) 116, *cert. den.* 348 U. S. 888. With respect to the last mentioned of these recent cases, the Supreme Court of Appeals of Virginia pointed out in its opinion in the case at bar (206 Va. at 927, 147 S. E. (2d) at 81):

> "The United States Supreme Court itself has indicated that the *Brown* decision [*Brown* v. *Board of Education,* 347 U. S. 483] does not have the effect upon miscegenation statutes which the defendants claim for it. The *Brown* decision was announced on May 17, 1954. On November 22, 1954, just six months later, the United States Supreme Court denied certiorari in a case in which Alabama's statute forbidding intermarriage between white and colored persons had been

upheld against the claim that the statute denied the Negro appellant 'her constitutional right and privilege of intermarrying with a white male person,' and that it violated the Privileges and Immunities, the Due Process and the Equal Protection Clauses of the Fourteenth Amendment. *Jackson* v. *State,* 37 Ala. App. 519, 72 So. 2d 114, 260 Ala. 698, 72 So. 2d 116, cert. denied 348 U.S. 888, 99 L. ed. 698, 75 S. St. 210."

The views expressed at length by the Virginia Supreme Court in the *Naim* case were subsequently adopted by the Supreme Court of Louisiana in *State* v. *Brown, supra.* In that case, the Louisiana Supreme Court declared (108 So. (2d) at 234):

"As we view the matter, marriage is a status controlled by the states, and statutes prohibiting intermarriage or cohabitation between persons of different races in no way violate the Equal Protection clauses of the state and federal Constitutions. See 16A C.J.S. Constitutional Law §§ 541, 543, pp. 474, 479-480. A state statute which prohibits intermarriage or cohabitation between members of different races we think falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children have difficulty in being accepted by society, and there is no doubt that children in such a situation are burdened, as has been said in another connection, with 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.[1]' "

[1] This quotation is from Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S. Ct. 686, 691, 98 L. Ed. 873.

So uniform has been the course of decisions from the earliest cases decided contemporaneously with the adop-

tion of the Fourteenth Amendment to the most recent decisions of Federal and State courts in the *Stevens, Brown, Naim* and *Jackson* cases, *supra,* that the law applicable to the constitutional issue presented in the case at bar is deemed to be no longer open to question. In this connection, the governing rule is well summarized in 36 Am. Jur. 452, Miscegenation: Section 3, in the following language:

> "In accordance with the power of every country to make laws regulating the marriage of its own subjects to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying, *it is considered as well settled that although miscegenation statutes have been persistently attacked on the ground that they are violative of the United States Constitution, they nevertheless constitute a proper exercise of the power of each state to control its own citizens.*" (Italics supplied.)

Research has disclosed only one case opposed to this "solid front" of judicial opinion sustaining the anti-miscegenation statutes of the various States. This is the case of *Perez* v. *Lippold,* 32 Cal. (2d) 711, 198 P. (2d) 17, in which the Supreme Court of California, in a 4-3 decision, invalidated the anti-miscegenation statute of California. Commenting upon this decision in its opinion in the *Naim* case, *supra,* the Supreme Court of Appeals of Virginia declared (197 Va. at 85):

> "The exception is California, where a divided court held to the contrary with three of the seven judges dissenting, in *Perez* v. *Sharp,* 32 Cal. (2d) 711, 198 P. (2d) 17 (sub nom. *Perez* v. *Lippold*). In one of the two concurring opinions it was pointed out that since California recognized a marriage performed in another State between persons of the white and colored races, such marriage could not be considered vitally detri-

mental to public health and morals, and that the California statutes forbidding miscegenetic marriages were distinguished from such statutes in other States in that they were entirely declaratory, while all the others carried with them punishments for violations, indicating an attitude of comparative indifference on the part of the California legislature and the absence of any clearly expressed sentiment or policy. *However that may be, the holding is contrary to the otherwise uninterrupted course of judicial decision, both State and Federal, as pointed out in the dissenting opinion, with which we agree.*" (Italics supplied.)

The above canvassed array of judicial decisions covering a period of almost one hundred years led the Supreme Court of Appeals of Virginia to observe in the instant case (206 Va. at 926, 147 S. E. (2d) at 80):

"The problem here presented is not new to this court nor to other courts, both state and federal, throughout the country. The question was most recently before this court in 1955, in *Naim* v. *Naim,* 197 Va. 80, 87 S. E. 2d 749, remanded 350 U.S. 891, 100 L ed. 784, 76 S. Ct. 151, aff'd. 197 Va. 734, 90 S.E. 2d 849, app. dism. 350 U.S. 985, 100 L. ed. 852, 76 S. Ct. 472.

"In the *Naim* case, the Virginia statutes relating to miscegenatic marriages were fully investigated and their constitutionality was upheld. There, it was pointed out that more than one-half of the states then had miscegenation statutes and that, in spite of numerous attacks in both state and federal courts, no court, save one, had held such statutes unconstitutional. The one exception, it was noted, was the California Supreme Court which declared the California miscegenation statutes unconstitutional in *Perez* v. *Sharp,* 32 Cal. 2d 711, 198 P. 2d 17 (sub nom. *Perez* v. *Lippold*).

"The *Naim* opinion, written for the court by Mr. Justice Buchanan, contains an exhaustive survey and

citation of authorities, both case and text from both state and federal sources, upon the subject of miscegenation statutes. It is not necessary to repeat all those citations in this opinion because the defendants concede that the *Naim* case, if given effect here, is controlling of the question before us."

In light of the foregoing, counsel for appellee submit it is manifest that Sections 20-58 and 20-59 of the Virginia Code are not violative of the Fourteenth Amendment to the Constitution of the United States.

D.

Wisdom of Statutory Policy

The historical background of the Fourteenth Amendment and the judicial exposition of the Fourteenth Amendment canvassed in Section B and Section C, respectively, of this brief conclusively demonstrate that—*as a matter of law*—the Fourteenth Amendment has no applicability to the anti-miscegenation statutes of the various States and does not circumscribe, to any degree, the power of the States to prevent interracial marriages. Under such circumstances, counsel for the Commonwealth assert that any judicial inquiry into the wisdom, propriety or desirability of preventing interracial alliances is completely inappropriate, and any evidence of a scientific nature tending to support or undermine the legislative determination of the propriety or desirability of such a policy would be completely irrelevant and incompetent.

The validity of this position is abundantly supported by authority. In this connection, the governing principles are well stated in 11 Am. Jur. 804, 808-813, Constitutional Law: Section 138, in the following language:

"One of the most firmly established groups of principles which has become *cardinal and elementary in the field of constitutional law* is that the *propriety, wisdom, necessity, utility, and expediency* of legislation are *exclusively matters for legislative determination.* The courts will not invalidate laws otherwise constitutional for any reasons such as these or declare statutes invalid because they may seem to the court to be detrimental to the best interests of the state.

* * *

"This judicial position has given rise to the oft-repeated *mandate* that the courts can have *no concern* as to the *expediency, the wisdom, or the necessity for the enactment of laws.* As has been said, the courts do not sit to review the wisdom of legislative acts. *It is not for the court to decide whether a law is needed and advisable in the general government of the people.* Where the legislative purpose has been declared in plain and unmistakable language, it is not within the province of the court to interpose contrary views of what the public need demands, although as individuals the members of the court may hold convictions contrary to those of the legislature.

"The basic principle already mentioned applies here with full force. The constitutionality of legislative acts is to be determined solely by reference to the limits imposed by the Constitution. The only question for the courts to decide is one of power, not of expediency or wisdom; and statutes will not be declared void simply because, in the opinion of the court, they are unwise. For protection against unwise legislation within the limits of recognized legislative power, the people must look to the polls and not to the courts.

"It is very important to discern constantly that the scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. *Whether an enactment is wise or unwise,* whether it

> is based on sound economic theory, whether it is the best means to achieve the desired results, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner *are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.*" (Italics supplied.)

In addition, the applicable doctrine is summarized in 16 C.J.S. 775-790, Constitutional Law: Section 154, in the following manner:

> "It is for the legislature to determine the justice, wisdom, policy, necessity, or expediency of a law which is within its powers to enact, *and such questions are not open to inquiry by the courts.*
>
> "The rule that the courts will not interfere with the legislative branch of the government by an inquiry into the justice, wisdom, policy, necessity, or expediency of an enactment has been applied in numerous instances and to widely variant subject matter, . . ." (Italics supplied.)

In the Supreme Court of Virginia, counsel for appellee successfully asserted the impropriety of any judicial inquiry into the wisdom of the anti-miscegenation policy reflected in the statutes under attack, or any analysis of scientific treaties or texts. Adopting this view, the Supreme Court of Appeals of Virginia observed (206 Va. at 929, 147 S.E. (2d) at 82):

> "The defendants also refer us to a number of texts dealing with the sociological, biological and anthropological aspects of the question of interracial marriages to support their argument that the *Naim* decision is erroneous and that such marriages should not be forbidden by law.

> "A decision by this court reversing the *Naim* case upon consideration of the opinions of such text writers would be judicial legislation in the rawest sense of that term. Such arguments are properly addressable to the legislature, which enacted the law in the first place, and not to this court, whose prescribed role in the separated powers of government is to adjudicate, and not to legislate."

If this Court (erroneously, we contend) should undertake such an inquiry, it would quickly find itself mired in a veritable Serbonian bog of conflicting scientific opinion upon the effects of interracial marriage, and the desirability of preventing such alliances, from the physical, biological, genetic, anthropological, cultural, psychological and sociological point of view. No better demonstration of the validity of this observation can be found than that presented by the opinion of the four majority and three dissenting Justices of the Supreme Court of California in *Perez* v. *Lippold,* 32 Cal. (2d) 711, 198 P. (2d) 17. Reference to that decision reveals that the Justices on both sides of this question could make wide appeal to a vast body of scientific materials to support their respective positions. The scientific authorities cited in the dissenting opinion in that case, as well as the utilization of such authorities by the dissenting Justices, is of such pertinence to the position taken by the Commonwealth in the case at bar as to merit extended quotation in the body of this brief (198 P. (2d) at 33-45):

> "Text and authorities which constitute the factual basis for the legislative finding involved in the statute here in question indicate only that there is a difference of opinion as to the wisdom of the policy underlying the enactments.
>
> "Some of the factual considerations which the legislature could have taken into consideration are disclosed

by an examination of the sources of information on the biological and sociological phases of the problem and which may be said to form a background for the legislation and support the reasoning found in the decisions of the courts upholding similar statutes. A reference to a few of those sources of information will suffice.

"On the biological phase there is authority for the conclusion that the crossing of the primary races leads gradually to retrogression and to eventual extinction of the resultant type unless it is fortified by reunion with the parent stock. (W. A. Dixon, M.D., Journal of American Medical Association, Vol. 20, p. 1 (1893); Frederick L. Hoffman, statistician, Prudential Life Insurance Co. of America, American Economics Association, Vol. II (1896) 'Race Traits and Tendencies of the American Negro'; C. E. Woodruff, 'The Expansion of Races' (1909).) In September, 1927, in an article entitled, 'Race Mixture,' which appeared in 'Science,' Vol. 66, page X, Dr. Charles B. Davenport of the Carnegie Foundation of Washington, Department of Experimental Evolution, said: 'In the absence of any uniform rule as to consequences of race crosses, it is well to discourage it except in those cases where, as in the Hawaiian-Chinese crosses, it clearly produces superior progeny,' and that the Negro-white and Filpino-European crosses do not seem to fall within the exception.

"In Volume 19 of the Encyclopedia Americana (1924), page 275, it is said: 'The results of racial intermarriage have been exceedingly variable. Sometimes it has produced a better race. This is the case when the crossing has been between different but closely allied stocks. * * *' Prof. U. G. Weatherly writes: 'It is an unquestionable fact that the yellow, as well as the negroid peoples possess many desirable qualities in which the whites are deficient. From this it has been argued that it would be advantageous if all races were blended into a universal type embodying the excellencies of each. But scientific breeders have long ago

demonstrated that the most desirable results are secured by specializing types rather than by merging them.

" 'The color line is evidence of an attempt, based on instinctive choice, to preserve those distinctive values which a racial group has come to regard as of the highest moment to itself.'

"In an address before the Commonwealth Club of California on July 9, 1948, Mr. William Gemmill, South African delegate to the International Labor Organization and one well acquainted with social conditions and sociological manifestations in that continent, made the statement that in South Africa, where the European population is greatly outnumbered by the natives, both classes are adamant in opposition to intermarriage and that the free mixing of all the races could in fact only lower the general level.

"A collection of data and references on the result of miscegenation is found in 'The Menace of Color' (1925) by J. W. Gregory (F.R.S., D.Sc., Professor of Geology in the University of Glasgow.) On page 227 he says that the intermixtures which have been beneficial to the progress of mankind have been between nearly related peoples and that the results of a mixture of widely divergent stock serve to warn against the miscegenation of distinct races. Dr. J. A. Mjoen of the Winderen Laboratory, Norway, is credited by Professor Gregory (at p. 229) with the conclusion from special studies that the evidence is sufficient to call for immediate action against the intermarriage of widely distinct races. Gregory states that where two such races are in contact the inferior qualities are not bred out, but may be emphasized in the progeny, a principle widely expressed in modern eugenic literature. Similar views asserting the unfortunate results of crossings between dissimilar races, including the American Negro-White, are ascribed by the author to Prof. H. Lundborg (1922); E. D. Cope, American Geologist; Elwang (1904); Prof. N. S. Shaler (1904); Emile Gaboriau and Gustav Le Bon, France; E. L. Hoffman of the

Prudential Insurance Co. of America (1923); Prof. A. E. Jenks; and Herbert Spencer (1892).

"In March, 1926, the Carnegie Institution of Washington, D. C., accepted a gift from one who expressed his interest in the problem of race crossing with special reference to its significance for the future of any country containing a mixed population. The work was undertaken by the Department of Genetics, Carnegie Institution. An advisory committee was organized consisting of W. V. Bingham, Charles B. Davenport, E. L. Thorndike, and Clark Wissler. Mr. Morris Steggerda was selected as field investigator. Mr. Steggerda had had excellent training in genetics and psychology, and had shown a marked fitness for the study and analysis of the individual. The main project was carried out in Jamaica, B. W. I., by studying in detail and comparatively, 100 each of adults of full-blooded Negroes (Blacks), Europeans (Whites), and White-Black mixtures of all degrees (Browns). Half of the hundred were of each sex. In addition to the main project some 1200 children of school and pre-school age were observed and measured. Finally in 1929, an extensive report was published by the Carnegie Institution, in book form entitled 'Race Crossing in Jamaica', by B. C. Davenport and Morris Steggerda, in collaboration with others. The results of their investigation indicated that the crossing of distinct races is biologically undesirable and should be discouraged.

"W. E. Castle, Bussey Institution, Harvard University, in an article entitled 'Biological and Social Consequences of Race Crossing' printed in Volume 9, American Journal of Physical Anthropology (April, 1926), stated on page 152: 'If all inheritance of human traits were simple Mendelian inheritance, and natural selections were unlimited in its action among human populations, then unrestricted racial intercrossing might be recommended. But in the light of our present knowledge, few would recommend it. For, in the first place, much that is best in human existence is

a matter of social inheritance, not of biological inheritance. Race crossings disturb social inheritance. That is one of its worst features.' This then leads to a consideration of the sociological phase.

"The writings of Father John LaFarge, S.J., are typical of many who have considered the subject of race-crosses from a sociological standpoint. Reference has been made to his work. 'The Race Question and the Negro' (1943). Under the heading 'The Moral Aspect,' he writes: '[T]here are grave reasons against any general practice of intermarriage between the members of different racial groups. These reasons, where clearly verified, amount to a moral prohibition of such a practice.

" 'These arise from the great difference of condition which is usually experienced by the members of the respective groups. It is not merely a difference of poverty or riches, of lesser or greater political power, but the fact that identification with the given group is far-reaching and affects innumerable aspects of ordinary daily life. * * *

" 'Where marriage is contracted by entire solitaries, such an interracial tension is more easily borne, but few persons matrimonially inclined are solitaries. They bring with them into the orbit of married life their parents and brothers and sisters and uncles and aunts and the entire social circle in which they revolve. All of these are affected by the social tension, which in turn reacts upon the peace and unity of the marriage bond.

" 'When children enter the scene the difficulty is further complicated unless a complete and entirely self-sacrificing understanding has been reached beforehand. And even then the social effects may be beyond their control. * * *

" 'In point of facts as the Negro group becomes culturally advanced, there appears no corresponding tendency to seek intermarriage with other races.'

"The foregoing excerpts from scientific articles and legal authorities make it clear that there is not only

some but a great deal of evidence to support the legislative determination (last made by our Legislature in 1933) that intermarriage between Negroes and white persons is incompatible with the general welfare and therefore a proper subject for regulation under the police power. There may be some who maintain that there does not exist adequate data on a sufficiently large scale to enable a decision to be made as to the effects of the original admixture of white and Negro blood. However, legislators are not required to wait upon the completion of scientific research to determine whether the underlying facts carry sufficient weight to more fully sustain the regulation.

"A review of the subject indicates that the statutory classification was determined by the Legislature in the light of all the circumstances and requirements (see also *California Physicians' Service* v. *Garrison,* 28 Cal. 2d 790, 802, 172 P. 2d 4, 167 A.L.R. 306; *Livingston* v. *Robinson,* 10 Cal. 2d 730, 76 P. 2d 1192); that under our tripartite system of government this court may not substitute its judgment for that of the Legislature as to the necessity for the enactment where it was, as here, based upon existing conditions and scientific data and belief; that even in the field of fundamental rights it has always been recognized that where the Legislature has appraised a particular situation and found a specific condition sufficiently important to justify regulation, such determination is given great weight when the law is challenged on constitutional grounds.

"Those favoring present day amalgamation of these distinct races irrespective of scientific data of a cautionary nature based upon the experience of others, or who feel that a supposed infrequency of interracial unions will minimize undesirable consequences to the point that would justify lifting the prohibition upon such unions, should direct their efforts to the Legislature in order to effect the change in state policy which they espouse—as was done in Massachusetts in 1843,

Kansas in 1859, New Mexico in 1866, Washington in 1868, Rhode Island in 1881, Minnesota and Michigan in 1883, and Ohio in 1887."

Moreover, it appears that there has been no diminution in the flood of scientific materials on this subject. See, Gates: Heredity in Man (1929); Gates: *Genetics, Taxonomy, and the Races of Man,* 68 *Journal of the Elisha Mitchell Scientific Society* No. 2, (1952); Keith: *A New Theory of Human Evolution* (1949); Darlington: *The Facts of Life* (1956); Mayr: *Animal Species and Evolution* (1963); Coon: *The Origin of Races* (1962); *The Race Concept: Results of an Inquiry* (UNESCO, 1952); Ingle: *Race Differences and the Future,* Science, Vol. 146. No. 3642, (1964); Ingle: *Race, Science, and Social Policy,* Science, Vol. 146, No. 3651 (1964). So far as counsel for the Commonwealth have been able to ascertain the most recent scientific treatise upon the propriety or desirability of interracial marriages from the psychological and sociological point of view is that of Dr. Albert I. Gordon, entitled *Intermarriage—Interfaith Interracial, Interethnic* published in 1964. This work has been characterized as the "definitive book on intermarriage" by Dr. Gordon W. Allport, Professor of Psychology at Harvard University, and as "the most careful, up-to-date, methodologically sound study of intermarriage in North America that exists..." by Dr. Herbert Gezork, President of the Andover Newton Theological School.

Typical of the findings, observations and conclusions set forth in this most recent treatise upon the subject of interracial marriages are the following:

[PP. 334-335]

"Inasmuch as we have already noted the higher rate of divorce among the intermarried, it is not proper to

ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?' If there is any possibility that this is likely to occur—and the evidence certainly points in that direction—it would seem that our obligation to children should tend to reduce the number of such marriages.

* * *

[P. 357]

"The argument that persons who oppose intermarriage—religious or racial—are per se 'prejudiced,' may be true of some persons; true, in degree, about others; and yet be completely untrue about still others. The desire to perpetuate one's own religion or to prevent its assimilation is understandable and reasonable. If it were necessary to 'prove' that each of us is entitled to life only because we possess some demonstrably unique or special talent or gift of mind or body, our society would be decimated in short order. Just as no individual needs to explain his desire to live, so it would seem to me that neither races of man nor religious or ethnic groups need offer apologies for their desire to perpetuate themselves. I believe that the tendency to classify all persons who oppose intermarriage as 'prejudiced' is, in itself, a prejudice.

* * *

[PP. 367-368]

"It is my conviction that intermarriage is definitely inadvisable. It places a greater stress and strain upon marriage than is ordinarily true when persons of similar religious views are married. We need not guess about this. In every case of interfaith marriage that we have examined, the facts about the greater strains involved have come to the fore. The fact that divorce and separation rates are higher in these interfaith marriages serves also to support this view.

* * *

"Intermarriages are wrong too because they are often based on the mistaken premise that, in this way, universalism and human brotherhood is assured. Not only has this theory not been proved—it has rather,

been exploded. Two nothings are still nothing. A plus and a minus simply cancel each other out. Nothing of any significance is gained by such a marriage. If all humans on a given day gave up all their differences (an utterly fantastic idea) we might have half a chance. But in the world as we know it such an idea is impracticable if not absurd.

* * *

"As I view it, intermarriage constitutes a threat to society and is not necessarily a promise of a brighter day to come.

* * *

[P. 370]

"Intermarriage, as I view it, holds no promise for a bright and happy future for individuals or for mankind. The evidence, as I view it, is clear on this point. The facts speak for themselves.

* * *

[PP. 372-373]

"The statistical evidence incorporated in this study makes it clear that the 'odds' do not favor intermarriages, in that almost two to four times as many intermarriages as intramarriages end in divorce, separation or annulment. This is a highly significant fact. It is objective and utterly free from emotion-inducing factors. It ought, therefore, to be considered and weighed most carefully.

* * *

"I lay no claim to omniscience or infallibility; hence, I can not claim that the views expressed here are correct in every detail and meet every situation. Both years of study of intermarriage as a concern of the social scientist, and years of intimate personal contact with people who have come to me asking for counsel and assistance with marital problems, make me feel that I may be of assistance to others who contemplate intermarriage. Perhaps our society will change so radically in its views and attitudes within the next decade that my views, too, will change. However, I doubt that such a condition is likely to occur. So for

the present these views are, I think, worthy of careful consideration and study."

These materials and others which we have set forth in the appendix to this brief, as well as still others which have been cited by counsel for the appellants, clearly demonstrate the conflicting views of eminent scientific authorities upon the wisdom or desirability of interracial marriages and the prevention of such alliances. See, Appendices B, C, D, E and F, *post,* App. 3-28. The scope and details of a State's anti-miscegenation statute may depend upon the nature and size of its population classifications and the character of the problem which certain types of interracial marriages may produce. In this connection, substantially all of Virginia's population falls within one of two categories—white and Negro. Statistics of the United States Bureau of the Census establish that over 99% of Virginia's residents are so classified—whites constituting 79+% of the population and Negroes constituting 20+% of the population. Residents belonging to all other racial classifications combined constitute less than one-fourth of 1% of Virginia's population. See, Appendix G, *post,* App 29. Of course, the population classification statistics of other States differ materially from those of Virginia.

In such a situation, it is the exclusive province of the legislature of each State to make the determination for its citizens as to the desirability, character and scope of a policy of permitting or preventing such alliances—a province which the judiciary may not, under well settled constitutional doctrine, invade. Counsel for the Commonwealth submit, therefore, that such scientific evidence is irrelevant to any proper area of judicial inquiry in the instant case, and that the determination of the General Assembly of Virginia upon this matter should be left undisturbed by this Court.

CONCLUSION

Upon a consideration of the whole matter, the Supreme Court of Appeals of Virginia declared (206 Va. at 929, 147 S. E. (2d) at 82):

> "The defendants direct our attention to numerous federal decisions in the civil rights field in support of their claims that the *Naim* case should be reversed and that the statutes under consideration deny them due process of law and equal protection of the law.
>
> "We have given consideration to these decisions, but it must be pointed out that none of them deals with miscegenation statutes or curtails a legal truth which has always been recognized—that there is an overriding state interest in the institution of marriage.
>
> * * *
>
> "Our one and only function in this instance is to determine whether, for sound judicial considerations, the *Naim* case should be reversed. Today, more than ten years since that decision was handed down by this court, a number of states still have miscegenation statutes and yet there has been no new decision reflecting adversely upon the validity of such statutes. We find no sound judicial reason, therefore, to depart from our holding in the *Naim* case. According that decision all of the weight to which it is entitled under the doctrine of *stare decisis,* we hold it to be binding upon us here and rule that Code, §§ 20-58 and 20-59, under which the defendants were convicted and sentenced, are not violative of the Constitution of Virginia or the Constitution of the United States."

It is difficult to comprehend how any other conclusion could have been reached. "Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the Legislature." *Maynard* v. *Hill,* 125 U.S. 190, 205. "Upon it society may be said to be built, and out of its fruit spring

social relations and social obligations and duties, with which government is necessarily required to deal." *Reynolds* v. *U.S.*, 98 U.S. 145, 165. Moreover, "under the Constitution the regulation and control of marital and family relationships are reserved to the States . . . [and] . . . the regulation of the incidents of the marital relation involves the exercise by the States of powers of the most vital importance." *Sherrer* v. *Sherrer*, 334 U.S. 343, 354.

The Virginia statutes here under attack reflects a policy which has obtained in this Commonwealth for over two centuries and which still obtains in seventeen states. They have stood—compatably with the Fourteenth Amendment, though expressly attacked thereunder—since that Amendment was adopted. Under such circumstances, it is clear that the challenged enactments infringe no constitutional right of the appellee. Counsel for appellee submit therefore that Sections 20-58 and 20-59 of the Virginia Code are not violative of the Fourteenth Amendment to the Constitution of the United States and that the judgment of the Supreme Court of Appeals of Virginia in the case at bar should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. D. McIlwaine, III, an Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for appellee in the above-captioned matter, hereby certify that copies of this Brief And Appendix On Behalf Of Appellee have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office, with first-class postage prepaid, this 17th day of March, 1967, pursuant to the provisions of Rule 33(1) of the Rules of the Supreme Court of the United States, as follows: Bernard S. Cohen, Esq., and Philip J. Hirschkop, Esq., 110 North Royal Street, Alexandria, Virginia; William D. Zabel, Esq., 52 Wall Street, New York, New York; Arthur L. Berney, Esq., 67 Winthrop Road, Brookline, Massachusetts; Marvin M. Karpatkin, Esq., and Melvin L. Wulf, Esq., 156 Fifth Avenue, New York, New York, and David Carliner, Esq., 1424 16th Street, N.W., Washington, D. C., counsel for appellants.

R. D. McIlwaine, III
Assistant Attorney General

APPENDIX

§ 20-50.—The State Registrar of Vital Statistics may prepare a form whereon the racial composition of any individual, as Caucasian, Negro, Mongolian, American Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains, and if there be any mixture, then, the racial composition of the parents and other ancestors, insofar as ascertainable, so as to show in what generation such mixture occurred, may be certified by such individual, which form shall be known as a registration certificate. The State Registrar of Vital Statistics may supply to each local registrar a sufficient number of such forms for the purpose of this chapter; each local registrar may, personally or by deputy, as soon as possible after receiving the forms, have made thereon in duplicate a certificate of the racial composition, as aforesaid, of each person resident in his district, who so desires, born before June fourteenth, nineteen hundred and twelve, which certificate shall be made over the signature of such person, or in the case of children under fourteen years of age, over the signature of a parent, guardian, or other person standing in loco parentis. One of such certificates for each person thus registering in every district shall be forwarded to the State Registrar of Vital Statistics for his files; the other shall be kept on file by the local registrar.

Every local registrar may, as soon as practicable, have such registration certificate made by or for each person in his district who so desires, born before June fourteenth, nineteen hundred and twelve, for whom he has not on file a registration certificate, or a birth certificate. (1924, p. 534; Michie Code 1942, § 5099a.)

§ 20-51.—It shall be a felony for any person wilfully or knowingly to make a registration certificate false as to color or race. The wilful making of a false registration or birth certificate shall be punished by confinement in the

penitentiary for one year. (1924, p. 534; Michie Code, 1942, § 5099a.)

§ 20-52.—For each registration certificate properly made and returned to the State Registrar of Vital Statistics, the local registrar returning the same shall be entitled to a fee of twenty-five cents, to be paid by the registrant. Application for registration and for transcript may be made direct to the State Registrar, who may retain the fee for expenses of his office. (1924, p. 534; Michie Code 1942, § 5099a.)

§ 20-53.—No marriage license shall be granted until the clerk or deputy clerk has reasonable assurance that the statements as to color of both man and woman are correct.

If there is reasonable cause to disbelieve that applicants are of pure white race, when that fact is stated, the clerk or deputy clerk shall withhold the granting of the license until satisfactory proof is produced that both applicants are "white persons" as provided for in this chapter.

The clerk or deputy clerk shall use the same care to assure himself that both applicants are colored, when that fact is claimed. (1924, p. 534. Michie Code 1942, § 5099a.)

§ 20-54.—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter. (1924, p. 535; Michie Code 1942, § 5099a.)

§ 20-55.—For carrying out the purposes of this chapter and to provide the necessary clerical assistance, postage and

other expenses of the State Registrar of Vital Statistics, twenty per cent of the fees received by local registrars under this chapter shall be paid to the State Bureau of Vital Statistics, which may be expended by the Bureau for the purposes of this chapter. (1924, p. 535; Michie Code 1942, § 5099a.)

APPENDIX B

INTERMARRIAGE:

Interfaith, Interracial, Interethnic

By Dr. Albert I. Gordon

(Excerpts—Italics Supplied)

[pp. 334-335]

"Inasmuch as we have already noted *the higher rate of divorce among the intermarried*, is it not proper to ask, 'Shall we then add to the number of children who become the victims of their intermarried parents?' If there is any possibility that this is likely to occur—and the evidence certainly points in that direction—*it would seem that our obligation to children should tend to reduce the number of such marriages.*

* * *

[pp. 348-349]

"Marriage out of one's own faith is, according to the evidence I have examined, almost three times less likely to succeed than ordinary marriages. Whether or not religious differences in these cases is only one of the factors that has resulted in the ultimate dissolution of the marriage, the fact is that interfaith marriages fail in far greater numbers than intrafaith marriages. If I were a betting man, I would certainly not wager against such odds.

"The chances for the success of an interracial marriage are, according to my research, even less than for that of an inter-faith marriage.

* * *

"I believe that the institution of marriage certainly does not require that we make martyrs of ourselves and of our children. Marriages in which the husband and wife have more (rather than less) in common are, according to all the evidence, far more likely to succeed. *And, inasmuch as 'success' in marriage is the desired goal, the information we have acquired about interfaith and interracial marriages ought to be heeded.*

* * *

[P. 352]

"It is important to recognize the fact that no greater abilities—physical, mental or metaphysical—have ever emanated from peoples who have assimilated and given up their own identity, than from those who have maintained their separateness and distinctiveness. Diversity in color, race, or religion, is, then, neither a blessing nor a curse in itself. It may become one or the other, depending entirely upon how diverse peoples use their diversity.

* * *

[P. 354]

"Persons anticipating cross-marriages, however much in love they may be, have an important obligation to unborn children. It is not enough to say that such children will have to solve their own problems 'when the time comes.' Intermarriage frequently produces major psychological problems that are not readily solvable for the children of the intermarried. Living as we do in a world that emphasizes the importance of family and religious affiliations, it is not likely that the child will come through the maize of road blocks without doing some damage to himself.

"I believe that parents who attempt to dissuade their children from intermarrying are not selfish, intolerant people, as their children and others are wont to say. They know, by their own experience, the experiences of others, and even intuitively as well, *that opposites in color or religion are far less likely to be as successful in their marriage as are persons of the same color and religion.*

* * *

[PP. 357, 358, 359, 360]

"The argument that persons who oppose intermarriage —religious or racial—are per se 'prejudiced,' may be true of some persons; true, in degree, about others; and yet be completely untrue about still others. The desire to perpetuate one's own religion or to prevent its assimilation is understandable and reasonable. If it were necessary to 'prove' that each of us is entitled to life only because we possess some demonstrably unique or special talent or gift of mind or body, our society would be decimated in short order. Just as no individual needs to explain his desire to live, so it would seem to me that neither races of man nor religious or ethnic groups need offer apologies for their desire to perpetuate themselves. *I believe that the tendency to classify all persons who oppose intermarriage as 'prejudiced' is, in itself, a prejudice.*

"Those persons who indicate a favorable attitude toward intermarriage may look upon such a course as one important means for the attainment of human brotherhood. They may be impelled by high motivations. In fact, they may be convinced that the quickest and surest way to conquer prejudice between peoples and groups is through such a practical means as intermarriage.

"*Such an argument appears to me to be weak, utterly impracticable and even fallacious.* Assuming that prejudices could, in fact, be utterly eliminated by the act of inter-

marriage, on what day, at what hour, at what minute, would all mankind be of one mind concerning acceptance of such a course of action? Obviously, from a practical point of view, it is not likely to happen.

* * *

"On the basis of group self-pride and self-respect, it does not appear likely that intermarriage will ever be regarded as a basic or major solution for the ills of our age. Universal brotherhood, freedom from prejudice, intolerance and hatred of the unlike will hardly be purchased at the price of the giving up of all group personalities. None of the great prophetic voices out of the past ever proposed that national or religious groups, however different from their own, should cease to exist in order to achieve universal brotherhood.

"*Viewed in terms of the short-time situation with which we are generally confronted, intermarriage appears to the major religious bodies, as well as to national ethnic and racial groups, to constitute a betrayal of the ideals and values which each professes.* It appears, also, to constitute a betrayal of family and group values. A deep hurt is often created in family and friend whose values are spurned. Pride is affected. Families, friends, religions and races, knowing that their 'values' differ from those of others, believe that their unique way of life is somehow endangered when mixed marriage occurs.

* * *

"Some proponents of human brotherhood insist that the biological, cultural and religious intermixtures of humankind would not only improve the human race, but would inevitably assure the ideal state in which brotherhood would become a fact rather than merely a desirable goal. Whether human society as a whole would be physically improved

by such admixtures remains to be proved. At most, all that can be stated with any degree of accuracy is that no one has yet provided any scientific evidence that the human race is physically despoiled by the intermingling of the blood of various races of mankind. Nor is there evidence to support the contention that because of these admixtures, society actually suffers a severe cultural loss. The evidence is not available because no society has wholly given up its own culture and substituted therefor the culture of another people. *Proponents of human brotherhood may believe that 'it would be a good thing' if we were not divided, in many cases arbitrarily into races, nations, cultures or religion, but there is not a single shred of evidence to support such a view.*

"There is, on the other hand, evidence available that we are in fact, separated by color, language, national, cultural, religious and ethnic differences. Those who support the premise that human brotherhood can come about only through the breaking down of racial, national, cultural and religious walls that now separate people from each other, tend to assume (a) that the fact that men are not biologically different from each other implies that cultures and religions, too, do not differ; (b) that there are no higher or lower cultures, no higher or lower religions. There are, in fact, cultures, civilizations and religions obviously more advanced or less primitive than others. Belief in the distinctiveness of a certain culture or religion and the desire on the part of some individual or group of individuals to perpetuate that distinctiveness because of its demonstrable superiority does not, of itself, make any person less a proponent of human brotherhood. It is rather a question of which road to take to reach the desired goal without destroying all other goals that have been or are in the process of being achieved by a particular society.

* * *

"Further, what may prove desirable for the individual may prove wholly undesirable for a group. An individual here or there may find the answer to his or her particular problem through intermarriage, but this seldom, if ever, is true of a group of any large segment of society.

* * *

[P. 362]

"I believe that basic differences will not be eliminated. I believe further that the most we can hope and work for with any degree of moderate success is that we will grow more accustomed to the idea that it is possible for persons of different colors, races, nations and religions to work together in many areas even while retaining their distinctiveness.

"Mixed marriages, in my view, need not necessarily prove harmful to and destructive of our society. *They may, however, dull the impact of that distinctiveness and uniqueness that often gives races and religions meaning and actually contribute to the improvement of our society.*

* * *

[PP. 367-368-369]

"It is my conviction that intermarriage is definitely inadvisable. It places a greater stress and strain upon marriage than is ordinarily true when persons of similar religious views are married. *We need not guess about this.* In every case of interfaith marriage that we have examined, the facts about the greater strains involved have come to the fore. The fact that divorce and separation rates are higher in these interfaith marriages serves also to support this view.

* * *

"Intermarriages are wrong, too, because they are often based on the mistaken premise that, in this way, universalism and human brotherhood is assured. Not only has this theory

not been proved—it has, rather, been exploded. Two nothings are still nothing. A plus and a minus simply cancel each other out. Nothing of any significance is gained by such a marriage. If all humans on a given day gave up all their differences (an utterly fantastic idea) we might have half a chance. But in the world as we know it such an idea is impracticable if not absurd.

"It is the duty of men and women of different faiths, colors and nations to learn to live together in peace and amity while maintaining their differences. Our duty is clear. We must learn how to live together despite differences that almost inevitably exist. It is our duty, further, to perpetuate those values and ideals that we know to be significant in our religious philosophy. Our obligation as humans is to learn to have respect for each other without regard to differences that may separate us in degree from each other. Conformity is not to be mistaken for an unmixed blessing. Blandness is not a virtue. The elimination of all differences in religion or color could only lead to blandness and is, therefore, not to be mistaken for a blessing to mankind *but rather as a serious threat to the welfare of individuals and the society of which they are a part.*

"As I view it, intermarriage constitutes a threat to society and is not necessarily a promise of a brighter day to come.

"On the basis of the evidence presently available it is clear, too, that the chances of happiness in marriage are greatest for those who are culturally, socially, educationally, temperamentally, ethnically, nationally, racially, and religiously more alike than they are different from each other. Opposites may attract, but that does not guarantee that they will stay together. *If one out of every three marriages are known to fail, and if we know that the percentage of these failures increases when differences in race and re-*

ligion are considered as separate factors in these marriages, we must conclude that intermarriage is unwise for most individuals and must, therefore, be regarded as a threat to both personal and group happiness.

"Our personal histories reveal the fact that no parent in a mixed marriage, however intelligent and capable he or she may otherwise be, can assure his children of the security in family and society they both want and need. Psychologically the children of mixed marriages are faced with more numerous emotional problems than we have a right to bequeath to them. *It does not seem reasonable, therefore, to intensify the nature and quantity of the difficulties that mixed marriages and the children thereof are likely to face!*

* * *

[PP. 369-370]

"A rereading of the factual material contained in this study of intermarriage in its various forms, and of its effects on those who intermarry, *leads me to the conclusion that intermarriage is actually a threat to ultimate happiness,* that the problems that result from the major differences in religion and race are so weighty as to require that those who would intermarry be persons of far greater strength and courage than is ordinarily required in marriage. If, in the average marriage, there are differences that must be resolved and adjustments that must be made, and if, even then, the divorce rate is about one in every three marriages, we may expect that the divorce rate for the intermarried will be much greater. We have offered the evidence to support this thesis in that the rate of divorce in cases of intermarriage is two to four times as heavy as the 'normal' rate.

"I believe that intermarriage is also a threat to the children of such a marriage, in that it may tend to make them marginal in their relationships to parents, their faiths or

their races. When we make it difficult and sometimes quite impossible for children to identify with us and our way of life, or our people, *we have created a threat to their welfare and to the welfare of society as well because highly charged emotional experiences often leave such children disturbed, frustrated and unable to believe that they can live normal, happy lives.*

* * *

"In the case of interracial marriages, I have found that the white partner often imagines that his or her child born of such a marriage is really white and the hope appears to be present that such a child though dark in color can 'pass.' Difficult as is the problem of the parent in such a situation, the problems which confront the children of Negro-white marriages appear to be even more complex and emotionally frustrating.

"Intermarriage, as I view it, holds no promise for a bright and happy future for individuals or for mankind. The evidence, as I view it, is clear on this point. The facts speak for themselves.

* * *

[PP. 372-373]

"The statistical evidence incorporated in this study makes it clear that the 'odds' do not favor intermarriages, in that almost two to four times as many intermarriages as intra-marriages end in divorce, separation or annulment. *This is a highly significant fact. It is objective and utterly free from emotion-inducing factors. It ought, therefore, to be considered and weighed most carefully.*

* * *

"I lay no claim to omniscience or infallibility; hence, I can not claim that the views expressed here are correct in every detail and meet every situation. Both years of study of intermarriage as a concern of the social scientist,

and years of intimate personal contact with people who have come to me asking for counsel and assistance with marital problems, make me feel that I may be of assistance to others who contemplate intermarriage. Perhaps our society will change so radically in its views and attitudes within the next decade that my views, too, will change. However, I doubt that such a condition is likely to occur. *So for the present these views are, I think, worthy of careful consideration and study.*"

APPENDIX C

Excerpts From
The Race Concept: Results of an Inquiry
Unesco Paris
(1952)

Physical anthropologists and geneticists throughout the world made so many criticisms of the various UNESCO Statements on Race* that UNESCO published a booklet entitled *The Race Concept: Results of an Inquiry* (1952), containing the objections of some of these scientists. On page 7 of this booklet, it is frankly admitted (in discussing the Statement on Race) that: "Some of its contentions, and some of the terms used, were much criticized, especially by physical anthropologists and geneticists." Speaking of the criticisms published by the scientific journal *Man*, the official journal of the Royal Anthropological Institute, the UNESCO booklet summarized these criticisms as follows:

> "... They considered that the document tended to confuse race as a biological fact and the concept of race as a social phenomenon; they also declined to acknowl-

* Statement on the nature of race and race differences (UNESCO).

> edge as a proved fact that there are no mental differences between racial groups, stressed that there was insufficient evidence to support that view, and urged the need for keeping an open mind on the subject. The statement that 'biological studies lend support to the ethic of universal brotherhood, for man is born with drives towards co-operation' came in for the most frequent criticism."

In the chapter of *The Race Concept* booklet entitled "Observations and Comments on the Statement as a Whole," the UNESCO publication admits that "Darlington, Fisher, Genna and Coon are frankly opposed to the Statement." By way of background it should be noted that Professor C. D. Darlington is Sherardian Professor of Botany at the University of Oxford, and the author of several major works in the field of human genetics; Professor R. R. Fisher was Professor of Genetics at the University of Cambridge, England, and one of the founders of the science of mathematical statistics; Professor Giuseppe Genna is Chairman of the Department of Anthropology at the University of Rome, and the author of an original study of racial differences in brain structure between Italians and Cameroon Negroes; and Professor Carleton Coon is Professor Emeritus of Anthropology at the University of Pennsylvania, and a past president of both the American Association of Physical Anthropology and the American Anthropological Association. Each of these four individuals is an outstanding authority in the field of physical anthropology or human genetics.

Professor Darlington's judgment of the UNESCO Statement on Race included the following comments, (p. 27):

> "... Today we understand very much more about how human society has evolved than Darwin did; but few

of us know the results of this evolution by our own observations better than he did. Fortunately genetics has given us every reason to agree with him. In *The Descent of Man* he writes: 'The races differ also in constitution, in acclimatization, and in liability to certain diseases. Their mental characteristics are likewise very distinct; chiefly as it would appear in thir emotional, but partly in their intellectual faculties.'

"By trying to prove that races do not differ in these respects we do no service to mankind. We conceal the greatest problem which confronts mankind (and particularly in respect of the organization of Unesco) namely how to use the diverse, the ineradicable diverse, gifts, talents, capacities of each race for the benefit of all races. For if we were all innately the same how should it profit us to work together? And what an empty world it would be."

With regard to the comments on the UNESCO Statement by Sir Ronald Fisher, the UNESCO booklet contains the following (p. 27):

"Sir Ronald Fisher has one fundamental objection to the Statement, which, as he himself says, destroys the very spirit of the whole document. He believes that human groups differ profoundly 'in their innate capacity for intellectual and emotional development' and concludes from this that the 'practical international problem is that of learning to share the resources of this planet amicably with persons of materially different nature, and that this problem is being obscured by entirely well intentioned efforts to minimize the real differences that exist.' "

Professor Giuseppe Genna made the following comments on the UNESCO Statement (p. 28):

"It should also be observed that in order to oppose race prejudice there would not seem to be any need

> to prove that human races are equal as regards psychical attributes. . . , Prejudice should be combated even if the psychical qualities of races differed very greatly. Knowledge of the psychological differences between human races is at present fluid and it would seem impossible to deny altogether the existence of these differences—at any rate as regards certain psychological aptitudes of the major groups—unless we are prepared to admit that these differences imply a racial hierarchy. In the absence of more exact information, it does not seem right to regard the problem as settled by a mere negative. . . ."

Professor Carleton Coon criticized the UNESCO Statement on Race as follows (p. 28):

> ". . . I *do not* approve of slanting scientific data to support a social theory, since that is just what the Russians are doing, and what Hitler did."

In addition to the statements received from the above four scientists, comments and criticisms were received from anthropologists and geneticists in many other countries. Professor Fritz Lenz, Professor Emeritus of Genetics at the University of Gottingen, and co-author of the widely used textbook *Human Heredity,* is quoted as criticizing the UNESCO Statement as follows (p. 30):

> "In my opinion one of the dangers of the present Statement is that it disregards not only the enormous hereditary differences between men, but also absence of selection as the decisive cause of the decline of civilization, and it therefore runs counter to the science of eugenics."

Professor Eugen Fischer, Professor Emeritus of Anthropology at the University of Freiburg and former Director of

the Kaiser Wilhelm Institute of Anthropology at the University of Berlin, made the following comments on the UNESCO Statement (p. 32):

> "But the Statement also purports to be an authoritative body of scientific doctrines, and this is quite a different matter. Without touching upon the content of these doctrines, and quite apart from whether or not they meet with my approval, I must register my fundamental opposition to the advancing of scientific theses as such, and protest against it.
>
> "I recall the National Socialists' notorious attempts to establish certain doctrines as the only correct conclusions to be drawn from research on race, and their suppression of any contrary opinion; as well as the Soviet Government's similar claim on behalf of Lysenko's theory of heredity, and its condemnation of Mendel's teaching. The present Statement likewise puts forward certain scientific doctrines as the only correct ones, and quite obviously expects them to receive general endorsement as such. I repeat that, without assuming any attitude towards the substance of the doctrines in the Statement, I am opposed to the principle of advancing them as doctrines. The experiences of the past have strengthened my conviction that freedom of scientific findings or opinions are elevated, by an authoritative body, into the position of doctrines."

Professor Karl Saller, Director of the Anthropological Institute of the University of Munich, and author of the comprehensive three-volume work, *Lehrbuch der Anthropologie,* (1957, 1959, 1962), similarly commented (p. 34):

> "Coming down to more specific details, I feel that there is a certain danger in the Statement, especially in so far as the drafts hitherto evolved have utterly disregarded or even flatly denied the existence of mental

(psychic) differences between certain groups of peoples. We may or may not give the name of race to such groups of human beings, who differ in their inherited psychic characteristics; but the whole science of eugenics is based on the existence of such hereditary psychic differences. . . ."

Professor Hans Weinert, Director of the Anthropological Institute at the University of Kiel and the author of several important works on the fossil history of man, criticized the UNESCO Statement in the following manner (p. 35):

> *"In regard to Section 9 (b)*, if it is true that all races have the same innate capacity for intellectual development, then why is it that so far only the members of the white race have built up any scientific knowledge?"

In addition to published comments on the UNESCO Statement as a whole, the UNESCO booklet *The Race Concept* published comments and criticisms by numerous scientists on different items in the Statement. The Brief for Appellants (p. 37) makes reference to Section 7 of the UNESCO Statement. On pages 62 to 64 of the UNESCO booklet, this paragraph is criticized sentence by sentence by Professors Darlington, Weinert and Krogman (Professor of Physical Anthropology at the University of Pennsylvania):

"SECTION 7

There is no evidence for the existence of so-called 'pure' races.

On this point, Darlington writes: 'Here we are back at the beginning again. In an outbreeding organism like man there are not pure races of the same character as in self-fertilized or parthenogentic organisms. Nevertheless in certain racial situations, as in Hawaii, it

would be foolish to overlook the fact that the Japanese, the Hawaians, and even the whites, are so-called pure races as compared with the offspring from crossing these races. It would be foolish to disregard the analogy with the Mendelian experiment in which one distinguishes between so-called F^1, F^2 backcross, and derivative, progeny.'

"In regard to race mixture, the evidence points to the fact that human hybridization has been going on for an indefinite but considerable time.

'The evidence', writes Darlington, 'points to the fact that wide crossing has never before taken place on such a scale as during the last 400 years. Sea transport has brought the most extreme human types together for the first time. The hybridization that took place before the invention of navigation was obviously of a very different order from what happens now and anyone who attempted to write human history and neglect this fact might just as well repudiate all biology.'

"As there is no reliable evidence that disadvantageous effects are produced thereby, no biological justification exists for prohibiting intermarriage between persons of different races.

Darlington, remarking that this is an example 'of the worst effects of reiterating the negative (presumably in answer to an invisible antagonist),' asks: 'What is the alternative? Disadvantageous with respect to what? To non-breeding? To incest? Or to crossing with an absent number of the same race? And in what circumstances? In the home country of one race? Or of the other? Or of both? When the Fuegians crossed with Europeans there cannot be any doubt that the progeny were superior to both parent races for living in Tierra del Fuego. But we may doubt very much whether the progeny were superior to both for living in Europe. Different kinds of results have arisen from race crossing in all parts of the world. They show reliably and conclusively that the progeny are dif-

ferent in innate capacity from either parent of the so-called pure race and that these differences are sometimes advantageous and sometimes disadvantageous, to one or both in the circumstances obtaining. Simply because the innate capacities of all races of men, as of animals, are different, and are suited to different circumstances and habitats.

'There might therefore be a 'biological justification for prohibiting intermarriage 'between races if intermarriage were not contrary to the habits of all stable communities and therefore in no need of discouragement.'

"Weinert writes about this section: 'Whether there is any 'biological' justification for considering races to differ in value does not alter the fact that human beings themselves attach different values to their races. Consequently, half-castes always try to win recognition as members of a 'higher' race, but this the latter race generally denies them. In defence of prohibiting marriage between persons of different races, I should like to ask which of the gentlemen who signed the Statement would be prepared to marry his daughter to an Australian aboriginal, for example.'

" 'By 'biological,' I assume that 'morphological' is meant,' writes Krogman. 'I think that it should be recognized that there are possible physiological differences which, though not prohibiting intermarriage, may be deleterious. I refer to sickle cell anaemia, Cooley's anaemia, as examples.' ".

In addition, each of the five paragraphs in Section 9 of the UNESCO Statement came in for considerable criticism from reputable physical anthropologists and geneticists. These criticisms were published on pages 65 to 70 of the UNESCO booklet, *The Race Concept*. Some of these criticisms are presented below:

"(a) *In matters of race, the only characteristics which anthropologists have so far been able to use effectively as a basis for classification are physical (anatomical and physiological).*

According to Genna, 'if anthropologists do not use psychological differences in their classification of races, that is due not so much to the fact that those differences are lacking as to the difficulty of determining them and to the element of subjectivity inevitable in their evaluation.'

"(b) *Available scientific knowledge provides no basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development.*

... Here is how Fischer would word this point: 'Available scientific knowledge provides a firm basis for believing that the groups of mankind differ in their innate capacity for intellectual and emotional development, seeing that such groups do differ undoubtedly in a very large number of their genes.'

"(c) *Some biological differences between human beings within a single race may be as great as or greater than the same biological differences between races.* (Original text: *The biological differences between human beings within single races may be as great as the biological differences between races.*)

Genna denies the validity of this corollary: 'Although it is true that biological differences between human beings within a single race may be of the same nature as differences between our race and another, it is also true that differences between races are usually greater than those which may exist between individuals of the same race.'

"(d) *Vast social changes have occurred that have not been connected in any way with changes in racial type. Historical and sociological studies thus support the view that genetic differences are of little significance in determining the social and cultural differences between different groups of men.*

Darlington's comment is: 'By this it is meant presumably that a governing class may be displaced by another class of the same race with vast effects. But are we certain that this does not involve great genetic changes, even physical changes readily visible—changes of course in a very small section of society? In all the first seven points the Statement has made use of the existence of class (within-race) differences as a means of casting doubt on between-race differences. Now it implies that class differences are not important. Possibly, of course, the committee imagines that class and caste differences, like race differences, have no serious genetic basis, that we are all in the melting-pot together? Yet if we turn back to the second paragraph, the only one that is based on serious thought, we find that mating barriers (such as occur between social classes) are supposed to be the origin of genetic differentiation.'

"Mather urges circumspection: 'There is at present little evidence of direct effect of genetic differences on social and cultural differences between groups (although see Darlington on the subject of speech preferences). But does this justify the statement that they are insignificant?. . .'

"(e) *There is no evidence that race mixture produces disadvantageous results from a biological point of view. The social results of race mixture, whether for good or ill, can generally be traced to social factors.*

Sturtevant's opinion of this corollary is as follows: 'The consequences of race mixture seem to me to be stated badly. There is a possible confusion between 'biological' and mental properties here. It is the general experience of those who have studied the results (at least beyond the first generation) of crosses between distinctly different strains of many kinds of organisms (including at least one mammal, the dog) that there is a strong tendency towards the production of physiologically inefficient individuals. The geneticist understands why this is so—and that understanding gives no

grounds for expecting man to be an exception to the general rule. It is true that such crosses give the possibility of producing some individuals that are 'better' (in any specified respect) than any to be found in either parental race—but experience and theory are agreed that, after the first generation, these are much less likely to be found than are 'inferior' individuals. The result of these considerations is that, even on a purely physiological level, crosses between quite different races are not free of danger.'

"Kemp makes this comment: '. . . If the races that have existed through several centuries can be supposed to have improved by selection, and therefore have a particularly harmonious and well-balanced constitution, race mixture can in certain cases be expected to lead to production of less harmonious and well-balanced types.' "

Professor A. H. Sturtevant was Professor of Genetics at the California Institute of Technology in Pasadena, California; Professor Kenneth Mather is Professor of Genetics at the University of Birmingham, England; and Professor Tager Kemp was Chairman of the Department of Genetics and Director of the Institute for Human Genetics at the University of Copenhagen, Denmark.

APPENDIX D

*Race Differences and the Future**

DR. DWIGHT J. INGLE
Professor of Physiology
University of Chicago

* * *

Most scientists accept the principle of equal legal and moral rights for the individual regardless of race or religion

* Science: Vol. 146, No. 3642, pp. 375 *et. seq.*, 16 October 1964.

and support the right of each individual to advance according to his abilities, drives, and behavioral standards. But the equality of man is a social, legal, and ethical, rather than a biological concept, for among living things nothing is equal to or identical with anything else. Even if we were to achieve equal civil rights and equal opportunities, complex problems would remain.

Some ethnic groups, the Negroes especially, are handicapped by a sub-standard culture. Centuries of slavery and racial discrimination have left some, though not all, Negroes with a cultural handicap which begins to be transmitted from adult to child in the earliest formative years. Do genetic handicaps occur more frequently among Negroes than among other ethnic groups? Racists claim that the Negro race is genetically inferior to other races in intelligence, while equalitarians claim that all races are equally endowed with intelligence. Both groups support their respective dogmas by spurious argument and emotionalism. Although it is common to speak and write of intelligence as a unitary quality of mind, it is surely complex (1) and is indirectly and imperfectly measured by standardized tests. Both racists and equalitarians claim special knowledge above the relative importance of native endowment and of environment in determining the level of intelligence. The conventional wisdom of the times is that biological differences among races are of no significance from the standpoint of social action. The climate of opinion in our courts, universities, and public press is not favorable either to further inquiry into the question or to debate of the issues. Even those who recognize that the question is unresolved claim that science must stand aside in the struggle for social values.

* * *

Why, then, examine the question of average racial differences in genetic endowment? The question remains im-

portant; first, because of efforts to place individuals in jobs, schools, and housing on the basis of race without regard for their abilities, drives, or behavorial standards; second, because of efforts to extend the concept of equality among races to a point where it conflicts with the rights of individuals to move ahead according to drive and ability in a free competitive society; and third, because of a growing body of opinion that the way to solve racial conflict is by the interbreeding of races. If it is true that there are significant differences between the genetic endowments of the races, this knowledge could and should affect the handling of biological and sociological problems.

* * *

Those who hope for the equality of all men without thought of their biology should be asked, "Shall we aim to make all men sick or all men well? Shall we aim toward universal incompetence or universal competence?" The concept of equality is meaningful only as it relates to civil rights and opportunities. Otherwise, to aim for the complete equality of all men is an affront to basic freedoms and rights of each individual to seek self-fulfillment according to his interests, drives, and abilities. The ideal of letting each individual move ahead in a competitive society according to his drives and abilities will be realized only if the individual is biologically fit for competition and is free from the almost insurmountable handicap of slum environment. This aim suits the United States, which intends to remain a free competitive society. The philosophy which abhors competition and holds that men are born biologically equal or, if they are not, that they should be kept equal by Procrustean methods, would establish mediocrity, not excellence, as a national goal.

APPENDIX E

*Race, Science, and Social Policy**

DR. DWIGHT J. INGLE
Professor of Physiology
University of Chicago

"Several authors of comments on 'Racial differences and the future' objected to the publication of views which disagree with their own. The key points of my essay were: (i) The question as to whether the average differences among the races in test performance, school achievement, and behavior have a genetic as well as environmental basis is unresolved. (ii) The issue is important and should be studied as a means to understanding the causes of social problems and correcting them. (iii) It is time to propose, debate, and test by pilot studies means of preventing social problems, rather than to depend upon palliative methods.

* * *

"I shall answer some specific comments. Jaquith makes the obvious point that there are a variety of positions on race and intelligence. His claim that not all racists maintain that Negroes are genetically inferior surprises me, for I hadn't heard of such. He states that in the absence of firm evidence to the contrary, there is no justification for assuming that racial groups are differentially equipped in respect to genetic potential. I agree that we shouldn't behave as though assumptions are facts, but add that neither is there justification for claiming that races are genetically equal until supported by firm evidence.

* * *

"Fischer and Deakin disagree with my doubts about encouraging interracial marriage. Many integrationists claim

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* Science: Vol. 146, No. 3651, pp. 1528 *et. seq.*, 18 December 1964.

that it is not an issue. It is a real and highly sensitive issue, for inter-breeding is being encouraged as a means of resolving racial problems. What is wrong with interracial marriage between culturally and intellectually compatible Negroes and whites? Too little is known of the biological consequences. The question of race and intelligence is unsettled. Less is known of the inheritance of various drives and behavior traits and their relationship to race. We look in vain for a country which is governed wisely by Negroes. Racial mixing cannot be undone. Let's facilitate Negro advancement by full civil rights and equal opportunity, reward and honor their achievements, prevent human misery of every race, but without accepting the social scientist's assurance that the biological experiment of inter-breeding can be done without risk to civilization.

* * *

"I have a final word on the right of the scientist to dissent against attempts to close systems of knowledge. In science we demand validation of each claim to knowledge by rigorous and critical tests of evidence. Positive claims are not final until there is proof that all alternative propositions are untenable. Science does not abdicate to authority or the tyranny of dogma—nor does it try to shape truth by aims and value judgments."

APPENDIX F

Time Magazine

(February 3, 1967)

GENETICS

Researching Racial Inferiority?

Pursuing scientific inquiry into the applications of solid-state physics, Bell Laboratories Physicist William

Shockley played a major role in the invention of the junction transistor, shared a 1956 Nobel Prize for his efforts, and made a substantial impact on technology and society. Now on the faculty of Stanford University, he is creating yet another stir by advocating a similar approach in a science far afield from his own. In speeches and interviews during the past three years, Shockley has charged that the scientific community has been ignoring or blocking research into possible differences in the genetic makeup of races. He has been accused, in turn, of fostering racial prejudice.

Shockley cites the increasing problems of Negro ghettos and the failure of one out of four youths—a high percentage of them Negroes—to pass the Armed Forces Qualifications Tests. Shockley asks: "Is environment the only cause? Is perhaps some of the cause hereditary?" After searching for answers in scientific literature, the physicist recently told a meeting of the Commonwealth Club of California that he found "only unconvincing assertions that carry no sense of certainty." This "environment-hereditary uncertainty," he says, prevents an intelligent attack on city slum problems and may be contributing to a decline in the overall quality of the U.S. population.

Worries, or Plans. Shockley attributes the uncertainty to "inverted liberalism," which he says has resulted in taboos against research on genetic differences. He charges that such institutions as the Federal Government and the American Anthropological Association have discouraged investigation because they might reach "unpalatable" conclusions. "Our intellectuals," he says, "treat this problem like a frightened person who hides an uncertainty even from himself and does not expose a tumor to a doctor's inspection."

To the genetics faculty of Stanford, which accused him

of seeking "pseudo-scientific justification for class and race prejudice," and to other critics, Shockley says: "Let's ask the questions, do the necessary research, find the facts, discuss them widely—then either worries will evaporate or plans for action will develop."

But many scientists agree with University of California Psychologist David Krech, who insists that it is the difficulty involved in measuring racial differences, rather than any taboo, that is responsible for the lack of evidence that Shockley demands. In any such research, says Krech, there must be the fundamental assumption: "If all other conditions are equal." At present, he adds, there is no such situation between large groups of Negroes and whites in America.

APPENDIX G

U. S. DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS

VIRGINIA: U. S. Census of Population, 1960, PC(1), 48D Va., Detailed Characteristics

48-317

Table 96.—AGE BY RACE, NATIVITY, AND SEX, FOR THE STATE, 1960 AND 1950, FOR URBAN AND RURAL AREAS, AND FOR STANDARD METROPOLITAN STATISTICAL AREAS AND CITIES OF 100,000 OR MORE AND COUNTIES OF 250,000 OR MORE, 1960

(Median not shown where base is less than 200 for 1960 or 500 for 1950)

AREA, CENSUS YEAR, AND AGE	ALL CLASSES			NATIVE WHITE		FOREIGN-BORN WHITE		NEGRO		OTHER RACES	
	TOTAL	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
THE STATE: 1960											
ALL AGES	3 954 429	1 969 556	1 984 873	1 542 787	1 544 615	19 398	25 203	403 144	410 990	4 227	4 065
UNDER 5 YEARS	456 885	231 662	225 223	174 596	167 930	1 019	1 058	55 366	55 531	681	704
5 TO 9 YEARS	420 201	213 529	206 672	160 365	154 095	1 168	1 131	51 525	50 977	471	469
10 TO 14 YEARS	388 099	196 605	191 494	150 936	146 754	1 042	933	44 284	43 476	343	331
15 TO 19 YEARS	324 236	168 368	155 868	132 425	120 498	587	830	35 113	34 389	243	151
20 TO 24 YEARS	281 849	149 612	132 237	122 225	104 622	1 003	1 630	25 835	25 681	549	304
25 TO 29 YEARS	254 605	126 604	128 001	101 799	100 203	1 064	2 337	23 233	24 903	508	558
30 TO 34 YEARS	273 306	134 569	138 737	108 754	108 617	1 173	3 111	24 267	26 474	375	535
35 TO 39 YEARS	291 161	143 124	148 037	114 559	117 628	1 471	3 039	26 831	27 045	263	325
40 TO 44 YEARS	260 476	129 789	130 687	104 110	104 265	1 182	1 623	24 318	24 648	179	151
45 TO 49 YEARS	233 650	117 253	116 397	93 374	92 667	1 277	1 269	22 472	22 366	130	95
50 TO 54 YEARS	194 093	95 548	98 545	76 360	79 235	1 480	1 302	17 555	17 898	153	110
55 TO 59 YEARS	165 422	79 941	85 481	62 746	67 603	1 640	1 565	15 432	16 171	123	142
60 TO 64 YEARS	128 885	60 234	68 651	47 226	54 366	1 468	1 399	11 472	12 824	68	62
65 TO 69 YEARS	108 543	49 083	59 460	37 127	46 226	1 456	1 369	10 447	11 831	53	34
70 TO 74 YEARS	79 336	35 051	44 287	26 673	35 050	1 163	1 183	7 156	8 005	59	49
75 TO 79 YEARS	51 597	22 188	29 409	16 753	23 875	724	673	4 682	4 831	29	30
80 TO 84 YEARS	26 256	10 440	15 816	8 197	13 035	290	457	1 953	2 317	...	7
85 YEARS AND OVER	15 827	5 956	9 871	4 562	7 946	191	294	1 203	1 623	...	8
MEDIAN AGE	27.1	26.0	28.2	26.8	28.9	45.0	37.6	23.0	24.1	23.4	25.7

SUPREME COURT OF THE UNITED STATES

No. 395.—October Term, 1966.

Richard Perry Loving et ux., Appellants, v. Commonwealth of Virginia. } On Appeal From the Supreme Court of Appeals of Virginia.

[June 12, 1967.]

Mr. Chief Justice Warren delivered the opinion of the Court.

This case presents a constitutional question never addressed by this Court: whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[1] For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.

In June 1958, two residents of Virginia, Mildred Jeter, a Negro woman, and Richard Loving, a white man, were married in the District of Columbia pursuant to its laws. Shortly after their marriage, the Lovings returned to Virginia and established their marital abode in Caroline County. At the October Term, 1958, of the Circuit Court

[1] Section 1 of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

of Caroline County, a grand jury issued an indictment charging the Lovings with violating Virginia's ban on interracial marriages. On January 6, 1959, the Lovings pleaded guilty to the charge and were sentenced to one year in jail; however, the trial judge suspended the sentence for a period of 25 years on the condition that the Lovings leave the State and not return to Virginia together for 25 years, stating that:

> "Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

After their convictions, the Lovings took up residence in the District of Columbia. On November 6, 1963, they filed a motion in the state trial court to vacate the judgment and set aside the sentence on the ground that the statues which they had violated were repugnant to the Fourteenth Amendment. The motion not having been decided by October 28 1964, the Lovings instituted a class action in the United States District Court for the Eastern District of Virginia requesting that a three-judge court be convened to declare the Virginia antimiscegenation statutes unconstitutional and to enjoin state officials from enforcing their convictions. On January 22, 1965, the state trial judge denied the motion to vacate the sentences, and the Lovings perfected an appeal to the Supreme Court of Appeals of Virginia. On February 11, 1965, the three-judge District Court continued the case to allow the Lovings to present their constitutional claims to the highest state court.

The Supreme Court of Appeals upheld the constitutionality of the antimiscegenation statutes and, after

modifying the sentence, affirmed the convictions.[2] The Lovings appealed this decision, and we noted probable jurisdiction on December 12, 1966.

The two statutes under which appellants were convicted and sentenced are part of a comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages. The Lovings were convicted of violating § 20–58 of the Virginia Code:

> "*Leaving State to evade law.*—If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20–59, and the marriage shall be governed by the same law as if it had been solemnized in this State. The fact of their cohabitation here as man and wife shall be evidence of their marriage."

Section 20–59, which defines the penalty for miscegenation, provides:

> "*Punishment for marriage.*—If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years."

Other central provisions in the Virginia statutory scheme are § 20–57, which automatically voids all marriages between "a white person and a colored person" without any judicial proceeding,[3] and §§ 20–54 and 1–14 which,

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[2] 206 Va. 924, 147 S. E. 2d 78 (1966).

[3] Section 20–57 of the Virginia Code provides:

"*Marriages void without decree.*—All marriages between a white person and a colored person shall be absolutely void without any decree of divorce or other legal process." Va. Code Ann. § 20–57 (1966).

respectively, define "white persons" and "colored persons and Indians" for purposes of the statutory prohibitions.[4] The Lovings have never disputed in the course of this litigation that Mrs. Loving is a "colored person" or that Mr. Loving is a "white person" within the meanings given those terms by the Virginia statutes.

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[4] Section 20-54 of the Virginia Code provides:

"*Intermarriage prohibited; meaning of term 'white persons.'*—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter." Va. Code Ann. § 20-54 (1966).

The exception for persons with less than one-sixteenth "of the blood of the American Indian" is apparently accounted for, in the words of a tract issued by the Registrar of the State Bureau of Vital Statistics, "by the desire of all to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas . . . ." Plecker, The New Family and Race Improvement, 17 Va. Health Bull., Extra No. 12, at 25-26 (New Family Series No. 5, 1925), cited in Wadlington, The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective, 52 U. Va. L. Rev. 1189, 1202, n. 93 (1966).

Section 1-14 of the Virginia Code provides:

"*Colored persons and Indians defined.*—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians." Va. Code Ann. § 1-14 (1966).

Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.[5] Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.[6] The present statutory scheme dates from the adoption of the Racial Integrity Act of 1924, passed during the period of extreme nativism which followed the end of the First World War. The central features of this Act, and current Virginia law, are the absolute prohibition of a "white person" marrying other than another "white person,"[7] a prohibition against issuing marriage licenses until the issuing official is satisfied that

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[5] After the initiation of this litigation, Maryland repealed its prohibitions against interracial marriage, Md. Laws 1967, c. 6, leaving 16 States with statutes outlawing interracial marriage: Alabama, Ala. Const. Art. IV, § 102, Ala. Code, Tit. 14, § 360 (1958); Arkansas, Ark. Stat. Ann. § 55–104 (1947); Delaware, Del. Code Ann., Tit. 13, § 101 (1953); Florida, Fla. Const., Art. 16, § 24, Fla. Stat. Ann. § 741.11 (1964); Georgia, Ga. Code Ann. § 53–106 (1961); Kentucky, Ky. Rev. Stat. Ann § 402.020 (Supp. 1966); Louisiana, La. Rev. Stat. Ann., Tit. 14, § 79 (1951); Mississippi, Miss. Const., Art. 14, § 263, Miss. Code Ann. § 459 (1956); Missouri, Mo. Rev. Stat. § 451.020 (Supp. 1966); North Carolina, N. C. Const., Art. XIV, § 8, N. C. Gen. Stat. § 14–181 (1953); Oklahoma, Okla. Stat. Ann., Tit. 43, § 12 (1954); South Carolina, S. C. Const., Art. 3, § 33, S. C. Code Ann. § 20–7 (1962); Tennessee, Tenn. Const., Art. 11, § 14, Tenn. Code Ann. 36–402 (1955); Texas, Tex. Penal Code, Art. 492 (1952); West Virginia, W. Va. Code Ann. § 4697 (1961).

Over the past 15 years, 14 States have repealed laws outlawing interracial marriages: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming.

The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California. *Perez* v. *Lippold*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

[6] For a historical discussion of Virginia's miscegenation statutes, see Wadlington, *supra*, n. 4.

[7] Va. Code Ann. § 20–54 (1966).

the applicants' statements as to their race are correct,[8] certificates of "racial composition" to be kept by both local and state registrars,[9] and the carrying forward of earlier prohibitions against racial intermarriage.[10]

I.

In upholding the constitutionality of these provisions in the decision below, the Supreme Court of Appeals of Virginia referred to its 1955 decision in *Naim* v. *Naim*, 87 S. E. 2d 749, as stating the reasons supporting the validity of these laws. In *Naim*, the state court concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," obviously an endorsement of the doctrine of White Supremacy. 87 S. E. 2d, at 756. The court also reasoned that marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment.

While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard* v. *Hill*, 125 U. S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so in light of *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), and *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942). Instead, the State argues that the meaning of the Equal Protection Clause, as illuminated by the statements of the Framers, is only that state penal laws containing an interracial element

[8] Va. Code Ann. § 20-53 (1966).
[9] Va. Code Ann. § 20-50 (1966).
[10] Va. Code Ann. § 20-54 (1966).

as part of the definition of the offense must apply equally to whites and Negroes in the sense that members of each race are punished to the same degree. Thus, the State contends that, because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes, despite their reliance on racial classifications, do not constitute an invidious discrimination based upon race. The second argument advanced by the State assumes the validity of its equal application theory. The argument is that, if the Equal Protection clause does not outlaw miscegenation statutes because of their reliance on racial classifications, the question of constitutionality would thus become whether there was any rational basis for a State to treat interracial marriages differently from other marriages. On this question, the State argues, the scientific evidence is substantially in doubt and, consequently, this Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.

Because we reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding that they serve a rational purpose. The mere fact of equal application does not mean that our analysis of this statute should follow the approach we have taken in cases involving no racial discrimination where the Equal Protection Clause has been arrayed against a statute discriminating between the kinds of advertising which may be displayed on trucks in New York City, *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106 (1949), or an exemption in Ohio's ad valorem tax for merchandise owned by a nonresident in a storage warehouse, *Allied Stores of Ohio,*

Inc. v. *Bowers*, 358 U. S. 522 (1959). In these cases, involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures. In the case at bar, however, we deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.

The State argues that statements in the Thirty-ninth Congress about the time of the passage of the Fourteenth Amendment indicate that the Framers did not intend the Amendment to make unconstitutional state miscegenation laws. Many of the statements alluded to by the State concern the debates over the Freemen's Bureau Bill, which President Johnson vetoed, and the Civil Rights Act of 1866, enacted over his veto. While these statements have some relevance to the intention of Congress in submitting the Fourteenth Amendment, it must be understood that they pertained to the passage of specific statutes and not to the broader, organic purpose of a constitutional amendment. As for the various statements directly concerning the Fourteenth Amendment, we have said in connection with a related problem, that although these historical sources "cast some light" they are not sufficient to resolve the problem; "[a]t best they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect." *Brown et al.* v. *Board of Education of Topeka et al.*, 347 U. S. 483

(1954). See also *Strauder* v. *West Virginia*, 100 U. S. 303, 310 (1880). We have rejected the proposition that the debates in the Thirty-ninth Congress or in the state legislatures which ratified the Fourteenth Amendment supported the theory advanced by the State, that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished. *McLaughlin et al.* v. *Florida*, 379 U. S. 184 (1964).

The State finds support for its "equal application" theory in the decision of the Court in *Pace* v. *Alabama*, 106 U. S. 583 (1882). In that case, the Court upheld a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro which imposed a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court reasoned that the statute could not be said to discriminate against Negroes because the punishment for each participant in the offense was the same. However, as recently as the 1964 Term, in rejecting the reasoning of that case, we stated "*Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court." *McLaughlin et al.* v. *Florida*, *supra*, at 188. As we there demonstrated, the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination. The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States. *Slaughter-House Cases*, 16 Wall. 36, 71 (1873); *Strauder* v. *West Virginia*, 100 U. S. 303, 307–308 (1880); *Ex parte Virginia*, 100 U. S. 339, 344–345 (1880); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961).

There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races. Over the years, this Court has consistently repudiated "distinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944), and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they "cannot conceive of a valid legislative purpose which makes the color of a person's skin the test of whether his conduct is a criminal offense." *McLaughlin* v. *Florida*, *supra*, at 198 (STEWART, J., joined by DOUGLAS, J., concurring).

There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. The fact that Virginia only prohibits interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.[11] We have consistently denied

[11] Appellants point out that the State's concern in these statutes, as expressed in the words of the 1924 Act's title, "An Act to Preserve Racial Integrity," extends only to the integrity of the white race. While Virginia prohibits whites from marrying any nonwhite (subject to the exception for the descendants of Pocahontas), Negroes, Orientals, and any other racial class may intermarry with-

the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.

II.

These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. *Skinner* v. *Oklahoma*, 316 U. S. 535, 541 (1942). See also *Maynard* v. *Hill*, 125 U. S. 190 (1882). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.

These convictions must be reversed. *It is so ordered.*

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out statutory interference. Appellants contend that this distinction renders Virginia's miscegenation statutes arbitrary and unreasonable even assuming the constitutional validity of an official purpose to preserve "racial integrity." We need not reach this contention because we find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the "integrity" of all races.

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SUPREME COURT OF THE UNITED STATES

No. 395.—October Term, 1966.

Richard Perry Loving et ux., Appellants, *v.* Commonwealth of Virginia.	On Appeal From the Supreme Court of Appeals of Virginia.

[June 12, 1967.]

Mr. Justice Stewart, concurring.

I have previously expressed the belief that "it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor." *McLaughlin* v. *Florida*, 379 U. S. 184, 198 (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.